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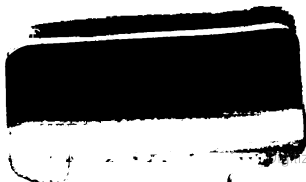
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THE  
LAWYER and BANKER

AND

SOUTHERN BENCH  
AND BAR REVIEW

CHARLES E. GEORGE

Editor



MAGAZINE DESIGNED  
FOR USE OF ACTIVE  
PRACTITIONERS OF  
THE LAW.    ❁   ❁   ❁   ❁

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# THE Lawyer and Banker AND SOUTHERN BENCH AND BAR REVIEW

CHARLES E. GEORGE, Editor  
FRANK C. HACKMAN, Associate Editor

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VOL. XV

JANUARY-FEBRUARY 1922

No. 1

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## *ITA LEX SCRIPTA EST*

*We Believe in the largest measure of individual liberty in all things consistent with the general welfare.*

Are the ethics of the medical profession as represented by the old schools being maintained along the liberalizing lines of present day civilization and advancement or are the devotees of *Materia Medica* relying upon the family album and contenting themselves with a review of the biographies of the masters who were in bud about the time of the signing of the Proclamation of Emancipation.

The law as a science is advancing. It commands a perspective of the years. It has seen towering notables reduced to wilted remnants, while plodding yokels have grown into legal giants. Doctors like lawyers must realize that the team of *Presto and Change* is doing *legerdemain* in every world center, that usages have petrified, that the individual medic no longer finds himself wedged and locked into a numbered social professional stratum where he may remain undisturbed. There have been meteoric flashes which have become raging fires across the open professional firmament, and those who have not seen these and recognized the fact are bound to find themselves in cataclysmal collapse. If the physician or the lawyer permit themselves to be picked up by the avalanche of progress and carried to the nameless depths of oblivion, they will notice a lot of superior scenery along the roadside, and can learn by deduction that the standard of ethics exemplified by the past have been turned on and off like an electric current.

Which way, Gentlemen of the Medical Profession, is your little solitaire special headed? Is your business a melting pot or a churn? You must remember that we live in 1922 in a land of advanced ideas and blow ups. There is no such thing as standing still while the facilities for falling down elevator shafts are unexcelled.

In another section of this magazine, will be found the beginning of a series of articles on Medical Ethics as Applicable to Chiropractic by writers of national repute. The subject is of great interest at the moment, owing to the broad and liberal interpretation of all State Statutes in the light of progress and advancement. "The Rule of Reason" adopted by the Supreme Court of the United States had a far wider effect upon the viewpoint of Jurists than would appear in reference to the case then at issue.

"What Constitutes the Practice of Medicine?" has long been a matter of much legal argument. The decision of our State Courts seems to be in line with the application that the giving of medicine for physical ailments or the diagnosing of such ailments is generally an intrusion of the law.

In the light of scientific development, we are of opinion that a statement by a chiropractic that he is a physician or a doctor would be within his rights. We believe chiropractors have a legal right to manipulate or make adjustments of the spinal column, and practice their calling or profession so long as they do not go into the realm of diagnosis or prescription without running afoul of the Statute.

In this connection, our contention is amply supported by the decision of Mr. Henry W. Herbert, Presiding Judge, of the Court of Special Sessions of the City of New York in re The Peoples vs. Frederick C. Terry, D. C. This case was for hearing on May 26th, 1921, in part two of the Court of Brooklyn, New York. Justices Herbert, Edwards and Salmon sitting. The defendant was discharged.

The term "diagnosis" seems to be the pitfall which is builded about the chiropractors—derived from the Greek prefix "dia" and "gignoskein" signifying to distinguish or discern. In the primary sense the word is used to designate a distinguishing between things, as defined in *People vs. Jordan* 172 California 391-398. In pathology, it means the recognition of a disease from its symptoms or the art or act of recognizing the presence of disease from its designs or symptoms and deciding as to its character. The leading cases on this point are *State Board of Medical Examiners vs. Freenor* 47 Utah 430, *People vs. Jordan supra* in which it is held that the treatment of disease is governed by the practitioners' theory as to cause. Other authorities

notably *Griswold vs. New York Central Railroad Company* 115 N. Y. 61. *Swan vs. Long Island Railway Company* 29 N. Y. S. 337 hold that "diagnosing" is merely guessing enlightened by experience.

It is true that as human ills are as innumerable as the sands of the ocean, still man's mind and body are the greatest workshop in the world; the chemical and organic forces constituting the same operate in life and in death in every possible variety of action and reaction making of the study an interesting natural science.

The East Indian Courts (*King vs. Salikonda Bombay Circuit, August 1921 M. L. J. Vol. 20, pp. 236*) held that osteopathic and chiropractic treatments unless accompanied by the giving of drugs or medicines are not violations of the public health code which provides that any person practicing medicine without a license shall be guilty of a misdemeanor and punished accordingly. In the case referred to, the defendant used both chiropractic and osteopathic means. The learned Justice presiding said in part:—

"There is no law that the defendant may not use his hands in the easing of pain or the curing of disease. He may even guess (medicine and diagnosis are not exact sciences) from given symptoms the ailment. To hold otherwise, would be an abuse of power, arbitrary in the extreme. It would be an unwarranted interference with the right of a subject to carry on a lawful business.

"We are also of opinion that the practice of medicine is yet in its swaddling clothes, and that 'within the infant rinds of God's small bower, poison hath residence and medicine hath power'. And that many of these medicines are yet locked within these rinds, and that keys to the locks will be fashioned and adjusted as new distempers appear, and as the big doctors as well as the little ones discover a key.

"Defendant's intentions were good, and it appears to us that he should not be dealt with."

It was the Healer of all ages who taught the laying on of hands and from that early date down to the present all Christendom has revered His name. It was not with drugs that Jesus treated the ailments of those who sought His power. There has been no new truth since was promulgated two thousand years ago, the doctrine:

"Seek and ye shall find; knock and it shall be opened unto you." Physicians of the old school will do well to give this admonition attention.

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## EDITORIAL COMMENT

That figment of the imagination called Time seems real enough as the world's clocks register the close of another year and the birth of a new one.

The pendulum approaches the annual equator, passes it, and swings on with rhythmic beat. Its pulse is without tremor, as men and women toast the dying year with all its lapses, and hail the new one with its white virginal pages.

"Time," says the philosopher, "is the essence of life, for it is all that life possesses."

Nineteen hundred and twenty-one passed into history as a reconstruction year. The thunders of major war have ceased, though minor conflicts continue to vex a world slowly struggling to its feet. The doctrine of force, to redress wrongs, dies hard.

Yet, the world has made some progress in the year that has gone. It has at least pioneered the path toward mutual disarmament, in a conference of the great powers. It has given Ireland her long-sought freedom, if she accepts the gift. Diplomacy, rather than bullets, once more triumphs.

Chile and Peru agree to arbitrate. Nations, even the smaller ones, realize that the world is sick of war.

And yet the political unrest in India, in Egypt, in Portugal and elsewhere, is convincing proof of the vitality of the war germ.

The greatest of all wars undermined thrones, and caste, and depotism. But it also gave aspirations for self-rule to hundreds of millions who have yet to become fit for it. The world moves slowly toward real democracy. Russia still gropes in the by-paths of communal frenzy.

Everywhere, the old order is passing. But the new, in many quarters of the earth, is still concerned with kindergarten toys. China, oldest of civilization, is coming up from second childhood. Her "open door" is not the result of her strength, but of mutual distrust among other powers.

The overshadowing issue in 1922 will be economics. Reconstruction will be fast or slow in the same ratio as problems of production and distribution are solved. Nations groan under war debts. Their several peoples are taxed almost to the breaking point.

But, in order that the world's equipoise may be restored, something more is needed than the adjustment of debts or financial wizardry. The biggest need is production on a colossal scale. The world's actual wealth was seriously impaired in the world war; the losses can be made up in a comparatively few years if production and trade are given the right of way.

The United States, as 1922 makes its bow, finds itself the undisputed giant of the economic world. Its treasury bulges with gold. The currencies of all the other trading countries are away below the American dollar in value. We became the world's creditor nation in the world war, and still hold the scepter.

Yet, in the United States, there is an army of unemployed; a comparatively slow recovery from trade depression; a widespread slump in agricultural prices. Tax burdens remain. And, to the nation's discredit, its ex-soldiers have suffered neglect.

The world is manifesting a real desire for peace. Will it not soon manifest a like desire for mutually helpful co-operation?

The lawyer has shared in the hardships of his clients. The widespread financial depression and the general feeling of insecurity have greatly lessened the number of new enterprises which would have required his advice and guidance. He will share in the benefits of the renewal of business which is sure to come as soon as a better understanding of our relations to the rest of the world prevails.

National pride is good, but national justice is better. If our statesmen

will turn from foreign entanglements long enough to set this nation on its feet again, economically, the coming year will be acclaimed by Americans as the best since the war.

Science, always neutral in politics, war or peace, has added its quota of discoveries to the old year's record. Philanthropy has poured millions into the lap of suffering. Art and music have forgotten the war clouds.

The silent reaper has taken his toll. Yet the lights are burning with expectancy as the sands of the old year's hour-glass run out.

The world's resiliency is in its New Year Eve's festivities, its farewell to the sunset's rays, its welcome to the rosy dawn.

And old Father Time views with placid eyes

"Such a tide as moving seems asleep,  
Too full for sound and foam—"

### PICKETING IS ILLEGAL.

Two Supreme Court decisions on the controversial question of picketing—watching and parading before manufacturing plants and business establishments, and accosting their employees—can not be said to have been Christmas presents to organized labor. In fact the first, rendered early in December, hamstringed union labor. The second opinion, handed down two weeks later in a five to four verdict of the justices, is directly in line with the previous opinion, for it narrows the limits within which picketing will be allowed. In the first instance, approximately two thousand Illinois foundry employees went on a strike, and established a force of pickets around the plant. The company obtained a court injunction against the pickets, but the strikers won on an appeal, and the case finally reached the Supreme Court. Here Chief Justice Taft drew a sharp line between peaceful persuasion by pickets and the employment of force to interfere with the free passage of workers to and from any plant; group picketing is held to be inconsistent with peaceful persuasion. Pickets, in other words, must not obstruct workers.

In the second, or Arizona decision, the Supreme Court goes farther in the same direction. Union leaders, it seems, ordered a strike in a Bisbee restaurant, and then placed pickets outside the place of business. Patrons of the place had to either run the gauntlet of a form of intimidation or dine elsewhere. The majority, it is said, preferred the path of peace, even if it led to another restaurant, with the result that the volume of business done by the picketed restaurant fell to one-fourth its original amount. Since an Arizona statute prohibits the issuance of injunctions by courts in picketing cases during labor disputes, and as the Arizona Supreme Court refused an injunction, the proprietor applied to the United States Supreme Court for equal protection under the law, and prohibition against the taking of property without due process of law. For, he argued, his business was his property, and the picketers were taking it away from him. The United States Supreme Court now reverses the State Supreme Court's decision regarding an injunction against picketing, and holds that the Arizona measure violates the Federal Constitution by taking property without due process of law and by failure to give equal protection to all. Said Chief Justice Taft in the opinion of the majority:

"The real question here is, were the means used illegal? The patrolling of defendants immediately in front of the restaurant on the main street and

within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long; the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and the threats of injurious consequences to future customers, all linked together in a campaign were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business.

"No wonder that a business of \$50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it was thus plainly a conspiracy.

"A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment."

The Illinois and Arizona decisions will put an end to a practise that was as odious as it was intolerable and disgraceful. It takes the bullets out of the picketer's cartridges, and virtually puts an end to picketing by union labor.

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#### TAX EXEMPT SECURITIES.

Inasmuch as in the recent sale of sixty million dollars' worth of federal farm-loan bonds was contributed the latest addition to the great mass of tax-exempt federal-authorized obligations, it is but natural that these bonds should be bearing the brunt of attacks being made on securities of this class by means of which much wealth throughout the nation is escaping at least part of the burden of post-war levies.

Since it is pretty generally established as an economic principle that tax exemption impairs public revenues while breaking down public credit, there is ample ground for criticism on the side of economists against any policy of piling up tax exemption upon tax exemption. The real question for the future is not as to the securities already marketed, a heritage largely of the war, but as to where a halt shall be called before the application of corrective measures.

It is pointed out that a courageous course of education would benefit those with avid appetites for tax-exempt federals more than would attempts to legislate against inevitable economic laws. In the specific case of the new farm-loan bonds it is pointed out, with apparent justice, that the losses to the federal treasury in taxes through exemptions more than offset gains in low interest obtained by farmers of the nation, with the result that added weight is put upon the burden of the general classes of the public not immediately affected either by consideration of low interest loans or the opportunity to cut down income taxes.

Therein lie dangerous sources of popular unrest.

When the day of constructive efforts to adjust the inequalities of taxation upon the public, quasi-public, and private obligations arrives—and the signs are plenty to indicate that the date when a start should have been is already passed—it will require more than the show of mathematical calculation to get results. Congressional constituencies will have to give place to broader considerations of public good for one thing, and some of them will need the "courageous course of education" to do that.

In the meantime it hardly seems the part of particular wisdom to single out farm-loan bonds or any other class of federal issue over another for special attack until a general public policy on the whole question of tax exemptions shall have been established.

---

#### SOME FIGURES ON KILLINGS.

According to the figures of a big insurance company, there were over 9,500 homicides—which were recognized as such—in the United States in 1921. This is a rate of over ninety homicides per million people per year. The total number shows a decline from 1920, but no one would say that the improvement is marked enough to call for congratulation. The prewar average in Britain is usually given as nine homicides per million per year, and that of Canada as thirteen. Even discounting European figures and sticking to those of a nation circumstanced somewhat like our own, it is evident that America has a wide range of possible improvement.

The standing of some American cities is best shown in a table, giving the homicide rate per million inhabitants per year:

Rochester, N. Y. ....	13
Boston .....	51
New York .....	59
Philadelphia .....	62
San Francisco .....	76
Chicago .....	103
Cleveland .....	125
St. Louis .....	126
Detroit .....	132
Memphis .....	634

Memphis has occupied her present bad eminence as the murder capital for many years, yet the figures give a shock to the most hardened student of statistics. It is something of a surprise to find "slow" Philadelphia having more killings than "wicked" New York; nor is one greatly pleased to see Chicago nearly doubling the homicide rate of the eastern metropolis. The figures of Chicago's crime commission, however, are even higher.

With the possible exception of Rochester, N. Y., the figures go far to show that criminal administration in every American city is faulty; and this when measured not by impossible standards of perfection but by actual achievements.

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From the extremists, both British and Irish, there are coming comments on the agreement, so satisfactory to all moderate and sensible people, that are either so fierce or so despairing as to indicate a real discontent, not with the agreement, but with the prospect of an ending of the old and bitter quarrel.

They remind one of the tale told long ago about the Irish landlord who, while driving through his estate, came to a cabin in front of which, surrounded by his many children and few chattels, sat a tenant for whom that cabin had been home for many years. To inquiries as to why he was there and what had happened, the tenant replied that he had been evicted by the landlord's agent. Thereupon the great man declared that some mistake had



been made—that he would see to it that the edict was revoked—and that the man should keep his home as long as he lived.

“You’re very kind,” was the answer, “but I prefer my grievance.”

Probably that story is not true, but possibly it is, and certainly its plausibility is supported by the sort of talk in which there is present indulgence both in England and America, as well as at both ends of Ireland.

All the die-hards are enraged at the thought of having nothing more to rage about. They prefer their grievances and life without them seems a poor, dull thing.

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#### THE NEW REVENUE ACT.

The revenue act of 1921, approved by the President on November 23, 1921, took effect on that date, unless otherwise therein specified. It comprises complete estate tax provisions. The usual \$50,000 exemption is given, besides certain deductions, as to estates of residents. The tax, unless sooner paid, is a lien for ten years on the gross estate, except parts expended in payment of charges against the estate and for payment of administration expenses, and allowed by court. The stamp tax provisions became effective January 1, 1922. Drafts or checks, payable otherwise than at sight or on demand, upon acceptance or delivery within the United States, whichever is prior, promissory notes, except bank notes, and for each renewal, for a sum not exceeding \$100, the tax is 2 cents; and for each additional \$100 or fraction thereof, 2 cents. Conveyances, except those given to secure a debt, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at time of sale, exceeds \$100 and does not exceed \$500, 50 cents; and for each additional \$500 or fraction thereof, 50 cents. Power of attorney, where authority confessed is not otherwise vested in grantee, 25 cents, with exceptions not applicable to ordinary real estate transactions. No provision for tax on title insurance policies.

# QUESTION OF ALIEN PROPERTY

By **Borris M. Komar** of the New York Bar.

What shall be done with the private property of those who during the late war were our enemies is the question of the hour now under discussion in commercial, congressional and governmental circles. While the proceeds of private properties confiscated through the Courts during the rebellion amounted according to the letter of Mr. Shaw, Secretary of Treasury to Nott Ch. J. of the Courts of Claims dated February 18, 1902—to less than two hundred thousand dollars, the funds in the hands of the present U. S. Alien Property Custodian amount to nearly four hundred million dollars. The interests involved, however, are also entirely unlike those of the Civil War times. Then practically all of the property seized consisted of raw cotton, while the property seized and sold by the successive alien property custodians, during the late war consisted of stocks and shares, valuable patent and trade marks, buildings and steamships as well as goods belonging to residents in enemy countries. Assuming that all the transactions for the sale of private properties seized by the United States during the late war would be upheld in the U. S. courts, the injury caused to the owners remains irreparable even though the U. S. government may refund to them the proceeds of these sales.

In the case of the raw cotton the owners of such, receiving the proceeds of the sales of their products sold by the special Treasury agents appointed by the Secretary of Treasury under the act of Congress of March 12, 1863 lost either their profits alone or their profits plus some of their expenses incurred while cultivating their plantations during the previous plantation season. In the present war valuable trade marks which had been brought into prominence by their owners through decades of effort and the expenditure of large sums of money, patents which could not be duplicated by their assignors, secret processes of the utmost importance to various great industries, all were confiscated and disposed of to new owners by the government of the United States. Would it now be proper and in accordance with the established principles of American policies to hand over the proceeds of these sales to the former enemy owners telling them to consider it as fair settlement of mutual obligations?

In the Civil War as Chase Ch. J. explained it in *U. S. vs. Klein* 13 Wall 128, 137:

No titles were divested in the insurgent states unless in pursuance of a judgment rendered after due legal proceedings. *The government recognized to the fullest extent the humane maxims of the modern law of nations, which*

*exempt private property of noncombatant enemies from capture as booty of war."*

In other words, the U. S. government at that period adopted the principle that unless private property of an alien enemy was one of the actual necessities of the war it should not be considered a war booty. For example, the court in *Lamar v. Browne* 92 U. S. 187 said, with reference to the cotton seized by U. S. from the private citizen of the Confederacy:

"It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. It (cotton) was the foundation upon which the hopes of the rebellion were built."

Such were the avowed principles with which the government of the United States started the second half of the nineteenth century. The settlement of Civil War claims arising from the confiscation of private property is best described in the above letter of Mr. Shaw which we will quote here in part:

"The rebellion had not been suppressed in all parts of the south when, on the 29th of May, 1865, the President of the United States issued a proclamation granting "to all persons who have, directly or indirectly, participated in the existing rebellion *restoration of all rights of property, except to slaves*. There were excepted cases in the proclamation, but the parties were afterward pardoned, either by the President or by acts of Congress.

"It is true in some cases private property was taken and used by the Union armies, without compensation at the time, but Congress, by the act of March 3, 1871, provided a commission to adjudicate those claims.

"You are aware that the act of March 3, 1863, which provided for the appointment of special agents to collect captured and abandoned property, provided, also that "any person claiming to have been the owner of any such property may at any time within two years after the suppression of the rebellion, prefer his claim to proceeds thereof in the Court of Claims."

"The rights to file claims in Court of Claims having ceased August 20, 1868, Congress provided another remedy—and passed the act of May 18, 1872, which provided that the secretary of the Treasury should return the proceeds derived from the sale of cotton illegally seized after June 30, 1865." (Moore's Digest of International Law, vol. VII, pp. 298-300.)

By article VII of the Peace treaty with Spain concluded at Paris on December 10, 1898 it was provided that:

"The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects, against the other government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article."

To sum up, the previous conduct of the United States towards the private property of its enemies may be expressed in the following principles:

(1) Only property comprising an actual necessity of the war is subject to confiscation.

(2) Proceeds of such seized property are returned to the owners thereof.

(3) The claims of private citizens between themselves remained to be settled privately amongst themselves.

(4) The United States renounced all claims of its citizens against the enemy government.

(5) The United States accepted upon itself the liability and adjudicated all the claims of its nationals against the enemy government.

On July 11, 1799 John Quincy Adams affixed his signature to an American treaty with Prussia, XXIII article of which stated:

**"If war should arise between the two contracting parties, the merchants of other country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance."**

Since then one hundred and twenty-two years have passed, making it possible for mankind to transact its business affairs without residing in one another's country. We have telephones, telegraphs, wireless, corporations, international conventions for protection of copyright, inventions and trade-marks. While the forms have changed the principles remained and were closely followed in Civil and Spanish wars.

Why should there be any hesitation as to the right disposition of the alien property held by the United States? If any new steps are necessary or desirable they should be taken towards enlarging the principle and not towards narrowing the same. How such proposal as that of paying the damages arising out of the sinking of the *Lusitania* by the proceeds of the sales of the alien property could have ever originated on this side of the Atlantic is inconceivable. Such a step would be nothing less than an attempt to deprive the business interests who have dealt with the aliens, allowed them credits or otherwise counted on their financial and business standing—of all security for the debts to them, no matter where such debts were incurred. The effect might be equal to the confiscation of the debts. Mr. Hamilton, arguing on the 10th article of the British treaty of 1794, said in reply to those

**"who represent the confiscation or sequestration of debts as our best means of retaliation or coercion, as our most powerful and sometimes as our only means of defense.**

**So degrading an idea will be rejected with disdain by every man who feels a true and well informed national guide; by every man who recollects and glories, that in a state of still greater immaturity we achieved independence without the aid of this dishonorable expedient. The Federal Government never resorted to it." (Hamilton's Works vol. VII. p. 329, Camillus No. XVIII.)**

The merchants and traders in their mutual relations usually take

and are entitled to take the reputation of a country and its inhabitants and their previous course of dealings as indicative of their future policies. Our civilization rests on a repetition of acts which are a result of many years of experience. The American people and their government through a long course of historic events established certain principles of dealing with the private property of enemy aliens seized during the war. These American principles logically developed would have been the best antidote to all the war-mongers particularly when they saw that even in the best case they had nothing to gain. Confiscation of private property during the war was the only business that U. S. as a nation could not and did not try to make a success of. Why then shall this course be swerved from today? The path is well trodden and no new or better principles need be searched for.

It may be argued that this country had on former occasions dealt with a certain set of circumstances which would not tally with those of today.

However, the government of the United States made repeated efforts to make private property of non-combatants immune from seizure by belligerent forces an inviolate rule of international law. At the first Hague conference of 1899 the following resolution was presented by the American delegation:

**"The private property of all citizens or subjects of the signatory Powers, with the exception of the contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure the vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of said Powers."**

At the second Hague Peace Conference of 1907 the subject matter of the above resolution was considered by the Fourth Committee and submitted for the consideration of the conference at Seventh plenary meeting. The resolution was not passed, but that in no way affected the standing of the United States. The resolution in its entirety was approved by the Congress of the United States on April 28, 1904.

It is clear, therefore, that we not only insisted on the adoption of the principle of absolute freedom of private property from any capture or seizure anywhere, but carried the matter so far as to exclude even the case of military necessity of the actual combatant armies—a right of seizure well conceded to the fighting armies in the field by all the leading authorities on international law.

We do not desire to stir up past memories. What has been done need not be lamented. The Alien Property Custodian Act had been passed and is a valid law of the land (*Stoehr v. Garvan* 41 S. Ct. 293)

But we do regret that the Alien Property Custodian was permitted to dispose of any of the properties seized by him other than perishable goods, if any. However, the question today is how to remedy the past actions and to harmonize them with the avowed American principles as analyzed here by us.

Any thought of offsets or counter accounts, such as the Lusitania damages or the like is repugnant in its very conception to the just disposition of German, Austrian and Hungarian properties now in our hands.

We raise our voice in favor of perpetuating the principles endorsed by our Congress, by John Quincy Adams, by Benjamin Franklin, by Thomas Jefferson, by William McKinley and Theodore Roosevelt. We believe that the alien properties should be returned to their rightful owners, that the alien property owners whose property was sold by the U. S. Alien Property Custodian and American citizens who suffered financial losses through any acts of enemy governments shall be entitled to the compensation to be fixed by the Court of Claims. This is the only course, in our opinion, which is in accord with our traditional policy in respect to enemy private property and to do otherwise is to destroy confidence, violate good faith, injure the interests of our commerce and adversely affect our prestige as a nation leading the crusade against the brutality of human warfare.

#### THE EDITOR'S MONOLOGUE.

"Scandal" and the world dances with you. Be a stallflower and you wilt alone.

\* \* \*

It sometimes pays to "let George do it."

\* \* \*

It is a well fed cat that licks her "chops."

\* \* \*

He who is mismated is often bossed.

\* \* \*

You are no unhappier than you think you are.

\* \* \*

When the "cat" is away the husband will play.

\* \* \*

It's never too late to spend.

\* \* \*

'Tis a bobbed cat that carries no tail."

# THE INCOME TAX PAYER AT WASHINGTON

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By Samuel T. Ansell of the District of Columbia Bar.

The Income Tax is with us to stay. Whether the guest is welcome or unwelcome, polished or uncouth, it will remain with us and demand our attention so long as our household runs. It is a thing of necessity and, dress it up as you will, in the essential respect of the amount of money required it will undergo little change for the better. The annual fixed charges of government amount to more than \$2,000,000,000, and the running expenses of \$2,000,000,000 more. With the World War we opened new pages in the book of public expenditures, and we must not deceive ourselves that we ever will or can go back to the pre-war place. Party promises, even performances, the budget, earnest desire and honest effort to economize, all these things cannot relieve us of necessary expenditures which only a heavy income tax rate can enable us to meet; and, if meanwhile we should incidentally indulge in some national luxury like war, we should have to resort to sterner measures. Aside from the general economic effect of the tax, it directly and vitally reaches all business activity. It is the duty, therefore, of every business director to prepare to meet the demand upon him as best he can. Since he must meet it, he should meet it intelligently, and it will be better if he will, as he can, meet it scientifically. This is not always, nor even for the most part, done.

The supreme tax gatherer sits here at Washington—the Treasury; and the business director very frequently does not provide for the best presentation of his case here. His mental attitude is often unhelpful. He has not yet had time to adjust himself and his business to the demands of the situation. He has to re-orient himself and acquire new appreciations. Instead of approaching his tax as a business problem, he permits it to appeal to his personal feelings. There is always a natural tendency in this direction. The word "tax", very significantly, comes from the same root as "touch", and whatever touches our pocket-books directly or indirectly touches, agitates and even irritates us, leading us to an unhelpful, critical attitude.

Now, of course, nobody any longer assumes that our lawmakers are "Olympian bards who sing divine ideas"; still, it is not difficult to agree with a remark I once heard a distinguished Federal Judge make from the bench that, "Criticism of Congressmen as you may, their collective wisdom upon highly technical subjects of legislation is remarkable." It must be said that, notwithstanding the "higher criticism" of legalists, economists and accountants, the series of Income Tax laws, including the present one, have worked out surprisingly well. To be sure, we discover in them but little of that "wisdom married to immortal verse", but we are reminded by that great philosopher-jurist, Justice Holmes, that tax

laws (he could have mentioned others) need not contain much poetry. The important thing is, the law is effective; it produces the revenue.

Instead of looking forward, the business director frequently looks backward to the simple days of simple taxes and simple methods of collection and administration, and becomes impatient with the present methods. It should be remembered that this great industrial and highly organized age has done away with simplicity in every relation of life. Principles and purpose remain unchanged, but the enormous scale and complexity of present-day transactions have necessitated radical changes of method. We find an analogy in modern warfare where strategy remains the same while tactical methods have undergone complete transformation to meet modern scientific requirements. The object of taxation is the financial maintenance of government, and for that purpose toll must be taken, and is taken, according to ancient and necessary principles. But the simple methods that obtained in the old days when condition were such as to make the "giving in," the assessment, collection and adjustment of taxes a matter between those of common understanding and frequently of neighborly knowledge, have no present application.

The simple methods of homely intimacy and common interest between-tax payer and tax-gatherer have been superseded necessarily by those of a different alignment. On one side, now, we have the formal processes of a remote and impersonal government; on the other, those of wealth-producing activities so complex that their income-producing factors are far from obvious and their taxable results difficult to define. Logically, then, the Federal methods of assessment, adjustment and collection, as they now and must ever obtain, are suggestive of arm's length dealings and of an adversary character. It behooves the taxpayer, therefore, to conduct his business and to keep his book accounts with a fair and intelligent regard for the tax law and with a view to the scientific preparation of just and accurate financial statements that will meet the tax requirement, if he would seasonably fix the financial facts which constitute the basis of government due and tax-payer's rights. It behooves him then to provide himself with that legal assistance competent to establish his just rights in the administrative forum of the Treasury.

The tax administration, notwithstanding a disposition in some professional quarters to assert otherwise, is well prepared to take care of itself in point of ability and, in any event, any lack in this respect will be more than offset by its advantage of position and power. Furthermore, in the light of its rules and practice, the administration is conducted fairly and with the utmost independence of personal and political influences; indeed, the experienced know that the attempt to make use of such factors is harmful, suggesting as it does a lack of confidence in the merits. The director of business, on the other hand, is frequently unprepared to assert effectively the rights that are his and that a skillful legal presentation of the results of a scientific audit would show to be his, and falls back upon a mixture of semi-professional representation and a resort to methods which, however common in business transac-



tions, are inappropriate and ineffective when employed in this connection.

None who appears before the Treasury should fail to remember that he is before administrative officials whose decisions are influenced by certain practical considerations rather more than by legal principles. There is a world of difference between administrative procedure and judicial principle applied to the same situation. Now that the war is over, all other administrative departments may be said to have "demobilized" and returned to "normalcy." In a very real sense, this cannot be said of the Income Tax Unit. That Unit is still on the firing line, not because it wants to be but because it has to be. It is up against the task of raising gigantic revenues under laws that are not designed to be over productive. Its motto, not publicly emblazoned of course, must be, "Get the money first and adjust afterwards." Considering the novelty of the income tax system, the necessity of organizing the administration from the ground up in abnormal war conditions and the huge sums to be collected, it must be said that the administration, however crude in spots, has been generally fair and surprisingly successful. To this practical necessity of getting all that the law can produce, the department has probably yielded too far. Such procedure tends to over-ride fundamental principles of law founded on sound public policy which are designed to favor the tax-payer and to give him deserved protection. Such a one is found, for example, in the rule that requires doubts in the construction of tax laws to be resolved in the tax-payer's favor. This is a good rule of law in a court but passes for less than its value in a Treasury forum. Administrative officials lose no chances. They are inclined to take all and accept a profitable compromise. Thus the burden is shifted to the tax-payer, and how much of it he can lift will be determined in no small degree by the thoroughness of the work of his auditor and the skill of his counsel in presenting the case.

Without question any tax situation that involves considerable amounts, or in any phase assumes a serious aspect, requires the services both of a competent accountant and of a lawyer familiar with tax laws and administrative methods. Accountancy, though a new profession with us, is one of prime importance to business in its connection with tax problems. In the solution of such problems, some directors rely entirely upon the accountant and some entirely upon the lawyer. In general, neither method is right; the services of both are needed. While in a given case it may be difficult to define exactly the line between the duties of the two, the views of Mr. J. Schapiro, of New York, a lawyer and also an accountant specially qualified in this field, seems to me to reflect the true principle and correct practice:

"Generally speaking, the accountant is better qualified to ascertain and fix the facts of a tax situation in a way best calculated to satisfy the Treasury Department. If the situation gets beyond the stage of mere presentation and discussions and contentions arise as to the meaning of the facts or the application of particular provisions of the statute or regulations, so that a hearing is necessary before the Income Tax Unit or before the Committee, the lawyer is better qualified to represent the tax-payer. His preeminence generally arises after the field audit

when few questions of fact remain. His field is exclusive where the construction of the statute or the regulations is in doubt or the constitutionality of any provision is questioned; as also in all cases involving suit for taxes or refund or where claims are to be compromised."

In this connection he also says:

"It may be well to note that the question has never been authoritatively settled whether accountants appearing before quasi-judicial bodies are not engaged in the practice of law requiring a license."

With the Income Tax with us, and to stay with us for all future time, it would seem to behoove those most affected to give it the careful, intelligent, and even scientific consideration that they would give to other factors in their business of much less financial moment. As was recently said by Colonel William S. Weeks, of The Calco Chemical Company:

"It must be remembered that in a successful business the income tax is one of the largest factors affecting net profit."

#### LAW OF CHANCE.

A game of cards is said to have suggested the system of life insurance now so universal.

A Flemish nobleman in the seventeenth century tried to divide equitably the cash staked upon an interrupted game of chance. He was helped in his attempt by Pascal, a distinguished French mathematician, who solved the problem.

The idea can be illustrated by the throwing of a dice, the chance of turn-up an ace being one out of six. In a large number of throws, the chances are in the same proportion. From this Pascal laid down the proposition that results which have happened in a given number of observed cases will again happen in similar circumstances, provided the numbers be sufficient for the proper working of the law of average.

The life of a person is one of the greatest uncertainties, but the duration, or rate of mortality, of a large number of persons, may be predicted with the greatest accuracy by comparison with the observed result among a sufficiently large number of persons of similar ages and occupations, and subject to similar climatic influences.

# THE SCIENCE OF MEDICINE

**Public Demand Medical Ethics of 1922 Do Not Retard Progress and Advancement.**

*By Charles A. Enslow of the Wisconsin Bar.*

Perhaps it is one of the natural characteristics of a man or a class of men to look with disfavor upon another man or class of men who hold different views or have advanced ideas concerning a given subject or matter. We are apt to become particularly impressed with our own peculiar ideas to the point of holding them to be infallible, and to look upon some other person's ideas and conduct conforming to them as being unsafe, or even demagogic. This idiosyncrasy is not peculiar to any particular man or class of men, but appears to be an attribute to all men, in varying degrees.

All of the pioneers in human thought and scientific investigation have been antagonized and their assertions of advanced development decried by the learned men of their times, and all the great advances in human progress have been forced through and over the stupidity, incredulity, and jealous opposition of men whose particular field of endeavor has been invaded.

It is well known that every branch of learning, every science, every art, has and always has had among its votaries certain great and prominent leaders who conduct the investigations and research into the eternal immediate beyond, and who seek out and grasp the great truths of nature, science, and art and in turn pass them to those within that sphere who are less progressive and who are content to serve rather than lead, and who make use of knowledge acquired and handed to them by the leaders. Most men, whether professional or lay, are entirely willing to accept without questioning, and at its reputed value, knowledge acquired by them from their recognized leaders and peers, and to hold a theory to be irrefutable simply because it has been unrebutted for a long period of time, or because they are too indolent to make the necessary investigation to prove or disprove it.

It is this willingness to accept without questioning and strive to sustain a theory asserted by others that has delayed and still delays progress in science, in art, and in every field of human endeavor.

It is a fallacy to conclude that any principle of any art or science is soundly established and true beyond refutation, for how often do we see the basic principles of science, as established by man, entirely annihilated and proved to be false by evidence so well known and so simple and so near at hand that scientists had to literally fall over it in order to reach their erroneous conclusions. We miss seeing

many things because we look for them at too great a distance:—if we want to see an angel we are too apt to direct our glance at the seats of the arch-angels.

“Man is still the greatest mystery to man. His mind and body are the greatest work-shop of the world. The chemical and organic forces, operating in life and in death, in every possible variety of action and reaction, makes him the most interesting study of natural science”. *Williams vs. Scudder, (Ohio, 1921) 131 N. E. 481.* And man is and has always been with us and round about us all the time.

Human ills are as innumerable as the human race, and each individual comprises within himself a world wholly unlike any other, with weaknesses and susceptibilities entirely his or her own, to such an extent that no ailment in one person can be measured by or compared with the ailment in any other person, exactly, although symptomology may point the way to a determination of the proximate cause of the trouble in any given case, with reasonable certainty. To this great unknown quantity must be added the uncertain human equation constituting a part of the diagnostician, with the possibility of incorrect diagnosis due to haste, over confidence in his ability, his carelessness, or, maybe, his ignorance.

Then comes the deluge of drugs—deadly poisons, secret and oft-times filthy nostrums, disgusting potions,—in an experiment to determine which, if any, of them is the proper dose for the disease; which of them, if any, will cure or kill.

So, truly, “medicine” must always be and remain what the courts—have denominated it—without criticising—“an experimental science.” For a great many centuries the physician limited his activities to the diagnosis of the particular case then under observation and the administration of drugs with a view to perfecting a cure, and seldom made use of surgery whatever, except an occasional “bleeding” or an amputation when necessary, and as a consequence it came to be understood and generally accepted by the people that the “practice of medicine” meant the prescribing and administration of drugs for the alleviation or cure of ills. Such understanding of the term continued down through the years and until leaders in medical thought were brought face to face with the fact that drugs could not be depended upon in every case, that the administration of them in any case was largely experimental, and they conceived and applied that system of treating disease which has come to be known as surgery, and in which the major part of the treatment and cure is effected by manual operations with the aid of instruments and appliances—the scalpel and the

saw,—and the operator was designated as a “surgeon” to distinguish him from one who merely “practiced medicine.”

Surgery had its opponents within the medical fraternity, and those of that fraternity who had been educated to “practice medicine”, and who were too indolent to investigate the innovation for themselves, scouted the idea that surgery was a less experimental science than “medicine” or that every human ailment could not be alleviated by the use of drugs as readily as by the use of the knife.

It was only after over-coming the greatest possible prejudice on the part of the physicians, and when the public demanded that form of treatment as being less experimental than drugs, that the physicians reluctantly recognized surgery as a branch of the healing art, and in due time provision in law was made to license and regulate the practice of surgery.

Since surgery has been recognized and practiced as a healing art, and the true nature and effect of drugs more understood, there has been a marked tendency to “throw physic to the dogs”—regardless of the welfare of the dogs—and it is now coming to be believed by the great mass of the people that the surgeons can do away with the mechanical appliances and instruments now being used in surgery, and that thereby a greater step forward will be taken than was taken when surgery so largely supplanted “the practice of medicine”.

The advent of surgery so changed the science and art of healing, that a new and more comprehensive definition of the term “practice of medicine” had to be found, so that now our courts have enlarged the scope until they deem that “the practice of medicine as ordinarily and popularly understood has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely on a knowledge of anatomy, physiology, and hygiene. It requires a knowledge of disease, its anatomical and physiological features, and its causative relations. Popularly, it consists in the discovery of the cause and nature of disease, and the administration, or the prescribing of treatment therefor.” *O’Neil vs. State*, 115 *Tenn.* 427, 90 *S. W.* 627.

It will be observed that the definition is broad and that within its purview would come practically every act that could be done where a human ailment is concerned. The courts have gone far in an effort to establish definitely just what acts shall constitute the “practice of medicine” under the statutes of the several states, when actions have been brought to test whether or not persons have “practiced medicine” in violation of the law, and in practically every instance it has been held that any act in any way relating to the art of discovering, preventing, alleviating or curing disease, or attempting it, is “practice of medicine”

in contemplation of law. It has been declared that any person who shall have and maintain an office or place of business and publicly expose a sign carrying such person's name and designation as a physician or surgeon, or any title that suggests his or her willingness to prescribe treatment for the alleviation or cure of disease, regardless of the system of treatment to be prescribed; or any person who publicly advertises with like intent, shall be deemed to be engaged in the "practice of Medicine." *State vs. Pohlman*, 51 Wash. 110, 98 Pac. 88.

In Iowa, one who represents that he is competent to discover and, through the stoppage of the leaks in the nervous system, remove the cause of disease sufficiently to give nature a chance to repair the damage done; or who represents himself to be a "master mechanic" of the human body and capable of removing a diseased organ; or who furnishes and directs the manner of using "tissue food" and other similar substances to persons applying for treatment, practices medicine within the meaning of the regulatory statute of that state. *State vs. Wilhite*, 132 Ia. 226, 109 N. W. 730; *State vs. Bresee*, 137 Ia. 673, 109 N. W. 45, *State vs. Yates*, 145, Ia. 332, 124 N. W. 174.

In New Mexico, opening an office for practice, or stating that one is willing to treat the sick, or prescribing the use of a specific drug by any person, or directing the employment of any other agency for the cure of mind or body, with intent to accept payment therefor, is to "practice medicine". *Territory vs. Lotspeich*, 14 N. M. 412, 94 Pac. 1025.

In New York, a person practices medicine when he hold himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury deformity or physical condition. *People vs. John H. Woodbury Dermatological Institute*, 109 N. Y. Supp. 578, 124 App. Div. 877.

The cases cited above show the extreme to which the legislatures and the courts have gone, in order to include within the regulation of the practice of the healing art, every possible branch, school and system, and it will be noticed especially that the mere offer to undertake to effect a cure constitutes the practice of medicine, regardless of whether or not the offer is accepted or the doctor ever has a patient.

Throughout the entire Union, each state has its own statute defining and regulating the practice of medicine, for which reason it is necessary in any given case to measure the act complained of by the interpreted statute.

There is no question as to the right of any state to enact laws to define and regulate the practice of medicine and surgery, or the healing art, within the state, for it is well understood that the legisla-

ture has power to restrict or prohibit any person or class of persons to engage in an enterprise that endangers the public health, whether the danger comes from acts done or acts omitted, and, therefore, since every branch of the science and art of treating human ills must necessarily be founded upon something more than a cursory knowledge of the human frame-work, if the interests of the people are to be considered, the legislature has power to enact that persons who are incompetent or not qualified shall not be permitted to deal with disease or wounds under any circumstance, as a physician, surgeon or healer.

*State vs. Natinoal School of Osteopathy*, 76 Mo. App. 439.

*State vs. Gravatt*, 65 Ohio St. 289, 87 A. S. R. 605.

*People vs. Love* 298 Ill. 304, 131 N. E. 809.

*Hayden vs. State*, 81 Miss. 299, 95 A. S. R. 471.

*State vs. Biggs*, 133 N. C. 729, 46 S. E. 401.

There is no school of medicine or surgery, osteopathy, chiropractic, or any other system of drugless or mental healing that could consistently take a stand in opposition to the right of the state to prescribe reasonable rules and regulations for the practitioners of any such system of healing, for "it is the right and power of the legislature to make reasonable requirements with reference to examination and qualifications to practice medicine, such as will keep parties who practice this profession abreast with the progress of the times." *People vs. Love*, 298 Ill. 304, 131 N. E. 809. It would be a sorry spectacle, to see an illiterate mendicant prescribe medicine for the cure of a disease about which he knows absolutely nothing, simply because he had the "nerve" to undertake to do it and there is no law to prevent him; or a chiropractor adjusting a subluxed vertebra without being qualified to determine whether or not it needs adjusting.

Since the state has power to prohibit the practice of medicine, surgery, osteopathy, chiropractic, drugless-healing, and Christian Science absolutely, under the police power, in the interests of the public, the duty of the state to provide means whereby the public may have the benefit of those same agencies, when they are established and recognized as beneficial, is no less obligatory, and the right and opportunity to make use of and enjoy them should not be defeated at the behest or instigation of any class of persons, since it has never been suggested that the police power of the state might be used as an instrument to deprive the people of anything that would conduce to their welfare.

Nor has it ever been said to be within the province of the state to discriminate between different classes of persons who are bent upon bringing good to humanity, and who have alike shown equal skill and

ability to bring benefit to mankind, albeit by different means; but it has always been considered by the people proper for the state to recognize and foster good from whatever source and in whatever guise it comes, and to safeguard it by legislation in the interests of humanity. *State vs. McKnight*, 131 N. C. 723, 42 N. E. 580.

The public generally has a well-defined idea of the jealousy that has been engendered in the medical men by the new schools and systems of healing—and the reason for it, and especially by the chiropractors; and that jealous prejudice has been made the subject of comment by the courts, one of which, in a very recent case, asserted that there is an unjust discrimination against chiropractors, and that “the prejudice existing against chiropractors by medical men and osteopaths is known to be intense and in many cases very unreasonable.” (*People vs. Love*, 298 Ill. 304, 131 N. E. 809). But, nevertheless, the public goes along about its usual business just the same, and smiles and wags its head at the side-show acrobatics and cavortings of the learned men who make up the membership of the several older schools; and all the while that same public sees and understands the weaknesses as well as the strength of each of the systems, and when necessity for a choice between them arises, takes counsel from past experience and employs whichever school or system promises the most good in any specific case, for which reason the newer schools and systems have continued to grow apace, as their votaries are able to show to the public definite and tangible results.

It required many years of hard work by the osteopaths and chiropractors to convince the public that pulmonary, liver, and gastric troubles could be successfully treated without the administration of nostrums internally, and that physic administered with a spoon, or in the form of pills or tablets, could be done away with entirely, and better and more lasting results obtained by substituting for it manipulation and adjustment of certain parts of the human organism.

For centuries the Æsculpians sought to convince the public that a mis-placed vertebra could be adjusted, and its attendant evils cured, by means of plasters and pills, but never achieved much success, as evidenced by the fact that the public took its vertebra to the chiropractor to be mended immediately when announcement was made by that school that adjustments could be made and permanent cures effected without drugs or surgery,—even though the medical doctors in their chagrin and rage did scoff and scold. The physician sensed the “scrapping” of his pellets; the surgeon saw the rust upon his idle knife—both closed their fingers over empty purses—retrospectively.



There has never been a better example in support of the truth of the saying that you "can fool some of the people all of the time, and all of the people some of the time, but you cannot fool all of the people all of the time."

The Chiropractic school has met with solid opposition from the membership of the old established order and one of the later schools whose passwords are "pestle" and "scalpel" and whose emblem is the skull and cross-bones resting on the top of a coffin beside an open grave; but after a time chiropractic secured some much deserved recognition from the public and which recognition by the public was heeded by the legislatures, until now in practically every state there is a statute regulating the practice of chiropractic, although in some states the regulatory statute places the power to license the chiropractor in a board of medical examiners so appointed, made up, and empowered as to permit the board to arrogate to itself the right to require of the chiropractor the same technical knowledge of drugs, their administration, and their supposed value as is required of every other school or system, regardless of the fact that such technical knowledge is of no practical value to the chiropractor, since it is never employed by him in his practice. Plainly, such a thing was never intended by the legislature. The state may require of the practitioners of each of the several schools whatever standard of knowledge and experience in their several school it may desire (*Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166), but in view of the unconstitutionality of a statute that unreasonably discriminates against certain persons or classes of persons (*State vs. Hinman*, 65 N. H. 103, 18 Atl. 194; *State vs. Gravett*, 65 Ohio St. 289, 62 N. E. 325; *People vs. Love*, 298 Ill. 304, 131 N. E. 809), the state cannot enact and sustain a statute requiring that all persons of all schools or systems shall be subjected to the same examination. (*People vs. Gordon*, 194 Ill. 560, 62 N. E. 858, *State vs. Biggs*, 133 N. C. 729, 46 S. E. 401) since there cannot be required of any person or class of persons, as a pre-requisite to engaging in any lawful pursuit a technical knowledge of things in no way whatsoever appertaining to such pursuit. In support of that statement, in a well-reasoned opinion, in a case having to do with the practice of one of the recognized systems of healing, one court said that "the state has not restricted the cure of the body to the practice of medicine and surgery—'allopathy', as it is termed,—nor required that, before any one can be treated for any bodily ill, the physician must have acquired a competent knowledge of allopathy and be licensed by those skilled therein. To do so would be to limit progress by establishing allopathy as the

state system of healing and forbidding all others. This would be as foreign to our system as a state church for the cure of souls." And in the same opinion it is said that "the courts have also held that of the many schools of 'medicine and surgery' the legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems 'allopathic', 'homeopathic', 'Thompsonian' and the like—should be examined upon a course such as is taught in the best colleges of that school of practice." *State vs. Biggs*, 133 N. C. 729, 46 S. E. 401.

Chiropractors are as much entitled to a separate classification as are osteopaths, dentists, pharmacists, or any other healer, because their system of treating human ills differs from all other methods of treatment, notwithstanding that the courts have in some instances suggested impliedly that chiropractic is but a branch of osteopathy. *State vs. Gallagher*, 101 Ark. 593, 143 S. W. 98; *State vs. Johnson*, 84 Kans. 411, 114, Pac. 390; *People vs. Love*, 298 Ill. 304, 131 N. E. 809.

In the opinion in *People vs. Love*, supra, the court says that "constantly comes proof before the courts that chiropractic, which apparently is a limited practice of osteopathy, does enable the chiropractor to relieve and cure many of the ailments of human beings and that the practice of this science is in no way deleterious to the human body. That is the proof in this record, and such is the proof that has been made in many other cases that have been reviewed by courts of last resort. *Board of Medical Examiners vs Freenor*, 47 Utah, 430, 154 Pac. 941; *State vs. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179; *State vs. Johnson*, 84 Kans. 411, 114 Pac. 390, 41 L. R. A. (N. S.) 539; *Norman vs. Hastings* (Tenn.) 234 S. W.,—not yet officially reported. In the last case cited, as shown by a "certified copy of the opinion filed in this case, the Supreme Court of Tennessee said of chiropractic: 'This science of healing is well developed and recognized in many jurisdictions and many believe in its efficacy.' The court further said that chiropractors cannot be classed along with charlatans and fakers, and that it is not suggested that the practice of the science is in any way deleterious to the human body. We must therefore, in this consideration treat chiropractic as a useful and lawful business, science, or profession, and not as one dangerous or unlawful in its exercise, and subject to abatement or destruction by unreasonable or arbitrary requirements, but as a profession or business that may be regulated by provisions prescribing reasonable requirements of those who apply to practice that profession, without unlawful or unjust discrimination."

Having by sheer force of merit compelled recognition of their system of healing by the people, the legislatures, and the courts, chiropractors should now give their attention to propaganda in their own interests, especially since it is demonstrated that their interests and the health and well-being of the people are one and the same thing, and seek legislation in every state to remove whatever of unjust, unconscionable, and unlawful discrimination against them may exist either in the statutes or in the actions of the self aggrandised examining boards. The propaganda ought always to be pressed in the light of the fact that "there is in all of the so-called learned professions a very decided and salutary tendency to raise rather than lower both the professional qualifications and the preliminary qualifications, ethical and educational, in the interests of the public health and welfare." *Williams vs. Scudder*, (Ohio, 1921) 131 N. E. 481), and promulgated in manner to conform to natural human progress

Where it is found that the laws are unnecessarily harsh, or are discriminatory; or where too much power is vested in the examiners, or where the examiners, by unfair interpretation of the law, are enabled to pursue a course of conduct such as to create a monopoly in any particular school of healing, the propaganda should be made to reach to the legislature, for "it is not to be supposed that the legislature would arbitrarily fix unreasonable limitation upon so vital a matter as the general requirements for examination, applicable alike to all who desire to engage in the high calling of the practice of medicine, but, on the contrary, we must presume that upon facts presented to the legislature which would show that chiropractors ought to be exempted from the provisions of chapter 6 (governing license to practice), the laws would be so amended or changed as to effect that object." *Hicks vs. State*, (Texas, Dec. 1920) 227 S. W. 302.

Therefore, in a state where the chiropractor must submit to an examination by a board which requires that before engaging in practice the applicant submit to the same examination as applicants from other schools or systems, and who must have pursued a course of study covering many subjects foreign to chiropractic practice, the legislature should be shown that "chiropractors have no occasion to apply much of this learning, that since their treatments are not shown to be injurious to anybody—they do not give medicine, operate or subject the body to injurious manipulation—the requirement that they study and be examined on subjects in no way pertaining to their occupation is an arbitrary and unreasonable attempt to restrict their liberties and the liberty of the people who wish to patronize them," and that "such

a regulation has no reasonable tendency to promote the public safety and welfare." *Norman vs. Hastings*, (Tenn.) 231 S. W. In this connection see also *Lawrence vs. Briry* 132 N. E. 174 and *Noble vs. Douglas* 274 Fed. 672.

The old schools—allopathic, homeopathic, osteopathic—are well intrenched behind a breastwork of laws enacted in their behalf and at their behest at a time when they saw the first faint shadow of the hand that later wrote upon the wall and before their transfixed gaze the one word that carried consternation to them—Chiropractic,— and they are fortified by a past of centuries duration during which they moulded the public thought to an acceptance of their own pet theories, even as they compelled the human system to absorb their experimental nostrums; and the chiropractic school of healing, in an effort to gain equal recognition and standing will not only have to overcome the centuries of teaching of the medics, but must educate the public as well to understand and employ the principles of chiropractic in the treatment and cure of ills, with a view to compelling legislation not only desired by chiropractors for their own good, but legislation essential to the continued advancement of the science of chiropractic and the welfare of humanity everywhere.

Achievement in this respect may be advanced or it may be retarded accordingly as the right or the wrong effort—propaganda—be put forth. One child stopped from talking itself to death and cured by a chiropractor, is better propaganda than all the lawsuits to compel recognition of chiropractors that could ever be tried in all the courts of Christendom; one blind United States Senator restored to normalcy by chiropractic would arouse among the people more sympathy for chiropractic and secure desired recognition and legislation quicker than would a hundred so-called "martyrs" penned up in every jail on earth.

Propaganda is either dignified—and successful—or it is foolish—and unavailing.

Christianity spread over the face of the earth by force of the teaching of its principles of truth and right, and not because of those martyrs who died for the faith that was in them.

And so Chiropractic will continue onward and upward to its goal because it can point to highest achievement in correcting human ills through and by means of the employment of right principles, if its achievements are properly exploited—and without sacrificing the liberty, the property, or the life of even one of its votaries.

(To be Continued.)

# PERSONNEL OF THE SUPREME COURT

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With each change in the personnel of the United States Supreme Court, a special interest is manifested in the small group of men who make up this distinguished body.

A brief sketch of the life of each member of the court, showing particularly his legal and judicial activities, is set forth below. The judges, other than the Chief Justice, are listed in the order of their appointment to the Supreme Bench. The frontispiece shows the appearance of the Justices as the bench now exists.

William Howard Taft was born in Cincinnati, Ohio, September 15, 1857. Graduated from Yale in 1878 and from Cincinnati Law School in 1880. He was admitted to practice in Ohio in 1880 and became Law Reporter of the Cincinnati Times and of the Cincinnati Commercial. He was Assistant Prosecuting Attorney of Hamilton County 1881-1883; practiced law in Cincinnati from 1883 to 1887; was Assistant County Solicitor of Hamilton County from 1885 to 1887. He was made Judge of the Superior Court at Cincinnati and served until 1890, when he became Solicitor General of the United States. In 1892 he was made United States Circuit Judge for the Sixth Circuit and served until 1900, when he was appointed President of the Philippine Commission. He became First Civil Governor of the Philippine Islands in 1901. From 1904 to 1908 he was Secretary of War in President Roosevelt's cabinet. Was twenty-seventh President of the United States, serving from 1909 to 1913. Became Kent Professor of Law at Yale in 1913. He was President of the American Bar Association in 1913. Was appointed Chief Justice by President Harding to succeed the late Chief Justice White.

Joseph McKenna was born in Philadelphia August 10, 1843. Was admitted to the bar of California in 1865 and served as District Attorney of Solano county from 1866 to 1868. He served as a member of the California House of Representatives from 1875 to 1876, and as a member of the National House of Representatives from 1885 to 1892, when he resigned to accept an appointment as United States Circuit Judge. He served as Attorney General in the cabinet of President McKinley from 1897 to 1898, when he was appointed Associate Justice of the Supreme Court.

Oliver Wendell Holmes was born in Boston March 8, 1841. Graduated from Harvard in 1861 and from the Harvard Law School in 1866. He served in the Civil War until 1864 and was admitted to the bar in Massachusetts in 1867, engaging in the practice at Boston. He became Associate Justice of the Supreme Judicial Court of Massachusetts in 1882 and served as Chief Justice from 1899 to 1902. He was appointed Associate Justice of the Supreme Court December 4, 1902.

William Rufus Day was born in Ravenna, Ohio, April 17, 1849. He was admitted to the bar of Ohio in 1872 and practiced at Canton from 1886 to 1890. He was judge of the Court of Common Pleas in 1889. He was appointed United States District Judge for the Northern District of Ohio, but because of poor health resigned before taking office. He was made Assistant

Secretary of State in March, 1897, and succeeded John Sherman as Secretary in April, 1898. In September, 1898, he became Chairman of the United States Peace Commissioners at Paris at the close of the war with Spain. From 1899 to 1903 he served as United States Circuit Judge for the Sixth Circuit and in February, 1903, he was made Associate Justice of the Supreme Court.

Willis Van Devanter was born at Marion, Indiana, April 17, 1859. Graduated from the Cincinnati Law School in 1881 and practiced law in Marion, Ind., until 1884, when he removed to Cheyenne, Wyo. He was City Attorney from 1887 to 1888. Chief Justice of the Supreme Court of Wyoming from 1889 to 1890. Assistant Attorney General of the United States from 1897 to 1903, at which time he was appointed United States Circuit Judge for the Eighth Circuit. In December, 1910, he was appointed Associate Justice of the Supreme Court.

Mahlon Pitney was born in Morristown, N. J., February 5, 1858, and was admitted to the bar in 1882. Practiced law at Morristown. He was a member of Congress from 1895 to 1899; a member of the New Jersey Senate from 1899 to 1901; Associate Justice of the Supreme Court of New Jersey from 1901 to 1908. He was made Chancellor of New Jersey in 1908, but resigned in 1912 to accept his appointment as Associate Justice of the Supreme Court.

James Clark McReynolds was born at Elkton, Ky., February 3, 1862. He graduated from the Law Department of the University of Virginia in 1884 and engaged in the practice of law at Nashville, Tenn. From 1903 to 1907 he was Assistant Attorney General of the United States and was Attorney General of the United States under President Wilson in 1913 and 1914. He was appointed Associate Justice of the Supreme Court in August, 1914.

Louis Dembitz Brandeis was born at Louisville, Ky., November 13, 1856. Graduated from Harvard Law School in 1877 and was admitted to the bar in Massachusetts in 1878. He practiced law at Boston from 1879 to 1916. He was special counsel for the Interstate Commerce Commission in the second advance freight rate case in 1913-1914, special counsel for the government in the Riggs National Bank Case in 1915, and counsel for the people in proceedings involving the constitutionality of women's ten-hour laws in Oregon and Illinois, the Ohio nine-hour law, the California eight-hour law, the Oregon minimum wage law, and in many other notable legal proceedings. He was appointed Associate Justice of the Supreme Court January 28, 1916.

John Hessin Clarke was born at Lisbon, Ohio, September 18, 1857. He was admitted to the Ohio bar in 1878 and practiced at Lisbon until 1880. From 1880 to 1897 he was a member of the bar at Youngstown, and from 1897 to 1914 he practiced at Cleveland. He was appointed United States District Judge for the Northern District of Ohio in 1914, and was appointed Associate Justice of the Supreme Court in 1916.

# LIENS-JUDGMENTS OF FEDERAL COURTS

(By Frank C. Hackman of the Seattle, Washington, Bar.)

(EDITOR'S NOTE:—This is the second of a series of articles by Mr. Hackman, touching upon powers exercised by the Federal Government with respect to real property.)

At common law the lands of a debtor were not liable to the satisfaction of a judgment against him, except for debts due the king, and consequently a judgment did not have the effect of creating a lien on the real property of the judgment debtor.(1) This was so by reason of the policy of the feudal system which did not allow the feudatory to charge or to be deprived of his lands for his debts, lest thereby he should be prevented from performing his stipulated military service, and which also prohibited alienation of a feud without the lord's consent.(2) Only the goods and chattels of a debtor, and the annual profits of his lands as they accrued, could be taken upon an execution based on a judgment.(3)

The lands of a debtor were, for the first time, made liable to satisfaction of a judgment against him, in England, by the statute of Westminster 2nd, (13 Edward 1) c. 18. This statute provided for the writ of *elegit* or writ of execution, and gave a judgment creditor an election to sue out a writ of *fieri facias* against the goods and chattels of the debtor, or else the writ of *elegit* commanding the sheriff to deliver to the creditor, among other things, a moiety, or half, of the debtor's lands until the debt should be paid out of the rents and profits therefrom.(4)

In the various states, in the absence of statutory enactments providing that judgments should operate as liens on real property, judgments have been held to have that effect by reason of the right to an *elegit*, or to an execution.(5) But it is only by express provisions of legislative enactments that judgments operate as liens in the modern sense of the term, and their scope and effect are dependent wholly upon the statutes creating them.

It is within the constitutional power of Congress to make judg-

- (1) *Blair v. Ostrander*, 109 Ia. 204, 80 N. W. 330, 77 A. S. R. 532, 47 L. R. A. 469; 3 Black. Com. 418.
- (2) *Morsell v. Wash. First Nat. Bank*, 91 U. S. 357, 23 U. S. L. Ed. 436.
- (3) *Erwin v. Dundas*, 4 How. 58, 11 U. S. L. Ed. 875.
- (4) *Erwin v. Dundas*, 4 How. 58, 11 U. S. L. Ed. 875; *Massingill v. Downs*, 7 How. 760, 12 U. S. L. Ed. 903; *Morsell v. Wash. First Nat. Bank*, 91 U. S. 357, 23 U. S. L. Ed. 436; *Jones v. Jones*, 1 Bland. (Md.) 443, 18 Amer. Dec. 327, 3 Black. Com. 418.
- (5) *Massingill v. Downs*, 7 How. 760, 12 U. S. L. Ed. 903; *Burton v. Smith*, 19 Pet. 464, 10 U. S. L. Ed. 248; *Cooke v. Avery*, 147 U. S. 357, 23 U. S. L. Ed. 436; *Coombs v. Jordan*, 3 Bland. (Md.) 284, 22 Amer. Dec. 236; *Shrew v. Jones*, 22 Fed. Cas. No. 12, 818; *U. S. v. Morrison*, 4 Pet. 124, 7 U. S. L. Ed. 804.

ments in the federal courts liens on the debtor's property, whether such property is or is not subject to the lien of judgments under the laws of the state, and to fix the territorial extent and duration of such liens independently of state laws.(6) But in this, as in all other matters relating to the practice and proceedings in the federal courts, it has been always the uniform policy of Congress to conform processes in the federal courts to those in the state courts.(7)

Prior to August 1, 1888, Congress had not exacted a law expressly providing that judgments and decrees of the federal courts should operate as liens upon the property of the judgment debtor. That they did so operate was due to the adoption by Congress of the modes of process prevailing in the states at the time the judicial system of the United States was organized.(8) The original act of Congress with respect to this matter was the Act of September 24, 1789, c. 20. Section thirty-four of that act provided that the laws of the several states, with certain exceptions, should be regarded as rules of decisions at common law in the courts of the United States in cases where they were applicable, and that the forms of writs and executions, and modes of process in the federal courts in suits at common law should be the same in each state respectively, as in the supreme court of the same. Next followed the Act of May 8, 1792, c. 36, permanently continuing the forms of writs, executions and other process, and the forms and modes of proceedings in suits at common law then in use under the act of 1789, subject, however, to the provision that the same might be altered by the federal courts by rule of court as they should deem expedient, or by such regulations as the Supreme Court of the United States might adopt.(9) Then followed the Process Act of May 19, 1828, c. 68, having provisions similar to the former and conferring power upon the federal courts by rule to alter final process therein so as to conform the same to any change made by the state legislature for the state courts. Repeated decisions of courts, including the Supreme Court of the United States held that, under the provisions of the first two of the foregoing acts, the laws of the states furnished the rule of decision in respect to the lien of judgments and decrees rendered in the federal courts upon the land of the debtor, and that the lien was a rule of property under the thirty-fourth section of the Act

(6) *Dartmouth Sav. Bank v. Bates*, 44 Fed. 546; *Wayman v. Southard*, 10 Wheat. 1, 6 U. S. L. Ed. 253; *Bank of U. S. v. Halstead*, 10 Wheat. 51, 6 U. S. L. Ed. 264; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 A. S. R. 137; *Corwin's Lessee v. Benham*, 2 Ohio St. 36.

(7) *Dartmouth Sav. Bank v. Bates*, 44 Fed. 546.

(8) *Baker v. Morton*, 12 Wall. 150, 20 U. S. L. Ed. 262.

(9) *Beers v. Haughton*, 9 Pet. 326, 9 U. S. L. Ed. 145; *Ward v. Chamberlain*, 2 Black. 430, 17 U. S. L. Ed. 319.



of September 24, 1789.(10) And the Process Act of May 19, 1828, was held to have been passed by Congress to confirm the view expressed by these decisions. Its effect or one of its effects, was to make judgments and decrees for the payment of money rendered in federal courts liens on the lands of the debtor in all cases and under like circumstances as when rendered in the state courts.(11) A question having arisen as to whether the adoption, under the foregoing acts, of the processes of the several states, included the adoption of state laws fixing the duration of judgment liens, Congress, on the 4th of July, 1840, (c. 43) passed an act on that subject, reading as follows:

"Judgment and decrees rendered in a circuit or district court, within any State, shall cease to be liens on real estate and chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon." This act adopted the laws of the states regulating the creation and duration of the liens of judgments, and make them applicable to judgments rendered in federal courts.

This indirect method, by adoption of state laws, of giving judgments of federal courts effect as liens is not in any sense a recognition of a right in the states to regulate the same. As said by a court: "That judgment liens are the creations of position law, without which they cannot exist, and that they cannot survive the law which gave them being, are principles too well settled to be drawn in question. I suppose it equally clear that they must be created by the government under whose authority the judgment is rendered. The state may determine the effect of its own judgments, but cannot effect those rendered by the courts of the United States; while the same limitation is equally true of the legislation by the general government. Each has an equal right to provide for the security and satisfaction of judgments rendered in its courts, but neither has any power whatever to limit the sovereign right of the other."(12)

Uniformity has been the aim. "Perfect coincidence of opinion upon the subject appears to have prevailed throughout between Congress and the courts, and on all sides apparently the endeavor has been to assimilate the proceedings in the federal courts for the levying of executions issued on judgments and decrees for the payment of money to those prevailing in the courts of the states."(13)

By the acts aforementioned the laws of the respective states fix the creation and duration of the liens of judgments of federal courts

(10) *Ward v. Chamberlain*, 2 Black. 430, 17 U. S. L. Ed. 319; *Ross v. Duvall*, 13 Pet. 64; *Beers v. Haughton*, 9 Pet. 361, 9 U. S. L. Ed. 145.

(11) *Ward v. Chamberlain*, 2 Black. 430, 17 U. S. L. Ed. 319.

(12) *Corwin's Lessee v. Benham*, 2 Ohio St. 36.

(13) *Ward v. Chamberlain*, 2 Black. 430, 17 U. S. L. Ed. 319.

rendered within the state; but the laws of the respective states fixing the territorial extent of such liens were not adopted by Congress prior to August 1, 1888, nor since that date in certain respects, as will be hereinafter set forth. In those states in which the judgment of a state court operates as a lien within the jurisdiction of the court rendering the judgment, usually a county, provision is commonly made for the extension of such lien upon the lands of the debtor in other counties by the docketing or recordation of an abstract or transcript of the judgment in the office of some county officer of such other county. These state statutory provisions have been held inapplicable to and of no force and effect with respect to federal courts. So that where the state law makes a judgment of a state court a lien on property in its jurisdiction, that same law operates to give a lien to the judgment of a federal court in its jurisdiction. Hence if the lien of the judgment of the state court was effective within a county, that of the federal court was so throughout its district without respect to county lines. (14) And this was held true, prior to August 1, 1888, even though the state statute expressly included and provided for federal judgments. (15)

Various reasons have been given for this holding. One was that it was a state provision that had been adopted by Congress and made applicable to federal courts. "The circuit courts of the United States exercise jurisdiction co-extensive with their respective districts. And it has never been supposed that, by the Process Act of 19th of February, 1828, which adopted the process and modes of proceedings in state courts, the jurisdiction of the circuit court was restricted. The 'process and modes of proceeding' in the states were adopted by Congress in reference to the jurisdiction of the circuit courts, and not with a view of limiting jurisdiction of those courts." (16) And as also said by the court in that case: "Any other construction would materially affect and in some degree subvert the judicial power of the Union."

Another reason was that neither Congress nor the federal courts could exercise any control over state officers by statutory requirement or judicial mandate. "A direct enactment by Congress that the county clerks within the state of New York shall docket judgments rendered in the federal courts within the state would be nugatory, and an indi-

- (14) *Massingill v. Downs*, 7 How. 760, 12 U. S. L. Ed. 903; *Brown v. Pierce*, 7 Wall. 217, 19 U. S. L. Ed. 134; *Ward v. Chamberlain*, 2 Black. 430, 17 U. S. L. Ed. 319; *Williams v. Benedict*, 8 How. 107, 12 U. S. L. Ed. 1007; *Barth v. Makeever*, 2 Fed. Cas. No. 1069; *Cropsey v. Crandall*, 6 Fed. Cas. No. 3418; *Blair v. Ostrander*, 109 Ia. 204, 80 N. W. 330, 77 A. S. R. 532, 47 L. R. A. 469; *Koning v. Bayard*, 14 Fed. Cas. No. 7924; *Lombard v. Bayard*, 15 Fed. Cas. 8469; *Shrew v. Jones*, 22 Fed. Cas. No. 12818; *U. S. v. Humphreys*, 26 Fed. Cas. No. 15422; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 A. S. R. 137.
- (15) *Carroll v. Watkins*, 5 Fed. Cas. No. 2457.
- (16) *Massingill v. Downs*, 7 How. 760, 12 U. S. L. Ed. 903.

rect requirement, by rendering it necessary to a judgment creditor to have it done, would in paucity of reason be equally ineffacious and void." (17) "It is not to be supposed that Congress would make the validity of judgments and decrees in the United States courts dependent upon acts of state officers over whom it had no control."

Yet another view arose from the effect such state docketing laws had upon suitors respectively in state and federal courts. "If the courts held the lien was restricted to the county in which the judgment was rendered, this would give a preference to suitors in state courts, because they could extend the lien of their judgments beyond the county in which they were rendered by filing transcripts in the clerk's office of other counties; but suitors in the federal courts were denied that privilege. The rule, therefore, was adopted of making the lien co-extensive with the jurisdiction of the courts. This rule resulted in giving suitors in the federal courts a preference over those in the state courts as to the territorial extent of the lien, and worked a hardship on the citizens generally. The mass of people relied confidently on the records in the clerk's office of their county disclosing all judgments that were liens on property in the county. Most people were ignorant of the all-prevailing lien of a judgment in a federal court, and they bought and sold lands on the faith of what the county records disclosed. The result was that cases of great hardship occurred. Persons who bought and paid for lands on the faith that the records in the county clerk's office showed the condition of the land with reference to judgment liens therein, afterwards lost their lands by reason of the liens of judgments in federal courts held in some other county, and often at a distance of hundreds of miles from the county in which the lands lay. (19) For judgments of United States courts are matters of record which parties are bound to take notice of as they are bound to notice judgments of the state courts. (20)

To correct these hardships, and to put suitors in the state and federal courts on an equal footing in respect of the territorial extent of the liens of judgments in the two jurisdictions, insofar as it lay in the power of Congress to effect such a result, Congress passed the Act of August 1, 1888. That act, so far as it is material to our inquiry, was as follows:

"SECTION I. Judgments and decrees rendered in a circuit or district court of the United States within any State, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered

(17) *Cropsey v. Crandall*, 6 Fed. Cas. No. 3418.

(18) *Cropsey v. Crandall*, 6 Fed. Cas. No. 3418.

(19) *Dartmouth Sav. Bank v. Bates*, 44 Fed. 546; and see *Massingill v. Downs*, 7 How. 760, 12 U. S. L. Ed. 903.

(20) *Andrews v. Dow*, 6 How. (Miss.) 554, 38 Amer. Dec. 450.

by a court of general jurisdiction of such State: Provided, That whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

(Act Aug. 1, 1888, c. 729, 25 Stat. 357; sec. 1606, U. S. Comp. St. 1916; Fed. Stat. Ann. 2d ed. p. 608).

This was the first act of congress expressly declaring judgments of federal courts should be liens. It places judgment liens of a federal court on an equality with those of a state court. But Congress did not have constitutional power to extend the territorial operation of a judgment lien in the mode provided by state laws for a judgment in a state court, as has already been stated. Congress could not make it obligatory on state officers to docket, enter or record a judgment of a federal court on their records. The state could require them to do so. It was in consequence of this the proviso was made, which, in effect, declares that when a state shall make express statutory provision for the docketing, etc., by state officers of federal judgments in like manner as judgments of state courts, then, and not before, the territorial extent (in other respects they are already the same) of the lien of a judgment in a federal court in the state shall be the same as that of a judgment of a state court. Where the laws of a state provide for the docketing, etc., of the judgments of its own courts in any county in the state but do not make a like provision for the judgments of a federal court, this act of Congress does not apply. In such latter case the lien of a judgment of a federal court continues to be co-extensive with its territorial jurisdiction.(21) Prior to the time this act was passed some state legislatures had enacted statutes expressly providing for the docketing of judgments of federal courts in a similar manner provided for judgments of the state. In one state where this was so the court held that though the state statute was not effectual prior to the taking effect of the act of Congress, that it did not follow that the end sought to be accomplished could only be attained by the enactment of a new state statute after the act of Congress was passed. Rather the act of Congress adopted the state statute and made it effective.(22) And it was held the judgment creditor under a federal judgment rendered prior to August 1, 1888, in a state where the state statute complied with the requirements of that act, had to comply with the state law within a reasonable time after the act of Congress became effective.

(21) *Dartmouth Sav. Bank v. Bates*, 44 Fed. 546.

(22) *Blair v. Ostrander*, 109 Ia. 204, 80 N. W. 330, 77 A. S. R. 532, 47 L. R. A. 469.

tive. And four months was held such reasonable time in this case.(23) But it has been the general view that the act of Congress was not retroactive and did not affect judgment liens that had attached prior to its passage.(24)

The act of August 1, 1888, when passed, contained also this provision:

"SECTION 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county, or parish in the state of Louisiana, in which the judgment or decree is rendered in order that such judgment or decree may be a lien on any property within such county."

This section was amended by Act of March 2, 1895, c. 180, in a way not now material, and as amended was repealed by Act of August 23, 1916, c. 229, which provided that the repealing act should take effect January 1, 1917.

(23) Wash. First Nat. Bank v. Clark, 55 Kan. 219, 40 Pac. 270.

(24) Commercial Bank v. Evertson, 6 Paige (N. Y.) 457; Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089, 64 A. S. R. 137; Commercial Bank v. Eastern Bank Co., 51 Neb. 766, 71 N. W. 1024.

# TITLE AND ABSTRACT DEPARTMENT

**Frank C. Hackman, Editor in Charge**

## TITLE GUARANTY AND ABSTRACT BUSINESS IN TENNESSEE.)

**(By John C. Adams, Attorney and Manager of Title Department of Bank  
of Commerce & Trust Co. of Memphis).**

While the compilation of abstracts of land titles was in vogue long before the business of insuring titles was thought of, the two subjects are so closely related that it may be incongruous to treat of them, in a short article like this, together. In the law books the two subjects constitute distinct classification, the liability of an abstracter, and the duties he owes his customer being quite different from those of an insurer of the title. The abstracter undertakes merely to set out the incidents in the title as appears upon the public records usually, although some abstracters go further and incorporate in their compilations various useful data known to the compiler which may assist the examiner; whereas the insurer or guarantor of the title undertakes in effect, to engage that the title is a good or marketable one, or in the alternative to pay for any loss sustained by the customer, should the title not be good or marketable.

Tennessee is not what is called a sectionized State. That is to say the land was originally conveyed by the State in large tracts called Grants, which contained sometimes an immense acreage; and the land contained in these grants was then sold off by the grantee as suited him, and has passed on down the line by mesne conveyance to the present owners by metes and bounds descriptions. As these descriptions began at a time when the corners or monuments were frequently trees or other natural monuments, which were referred to in repeated conveyances, long after the original monument had disappeared, the difficulty of following such descriptions and locating the land frequently, can be imagined; and it is a tribute to the skill of the abstract fraternity, the accuracy with which they have performed this task. An old conveyance in the City of Memphis began on the south side of a street at the corner of the "asparagus bed" and then described the parcel by metes and bounds, and this description was followed for years after the asparagus bed disappeared. Of course property lines have now been pretty well ascertained and monumented.

Records of transfers in Tennessee are kept in what is known as the "Register's Office". The instrument is first noted in what is known as the "Note Book", by date and filing time, and is copied by the Register's office force into the permanent records. The abstract companies take off the lists of these transfers daily and post them in their tract indices. Wills are handled practically the same way, except that the record thereof is in the County Court, except in some of the large counties where a special Probate Court has been established by the Legislature, such as Shelby County, in which Memphis is located. Abstract companies now exist in most of the counties. Where there is no corporation or abstract company the abstracts are compiled by attorneys from the indexes in Register's office or county court, in the old way. The Memphis Abstract Company, in Shelby County has been in existence some sixty years, and does a general abstract business.

In 1917 the Tennessee Legislature enacted the Torrens Land System of registration. This system has been very little used however, the reasons being no doubt that the proceeding must be begun with a lawsuit, entails considerable expense, and does not seem to be conclusive after the decree has been rendered.

The system of guaranteeing titles is now pretty well established in the larger counties of this state. About 20 years ago the Memphis Trust Company, which was absorbed by the Bank of Commerce & Trust Company, wrote the first title policy in West Tennessee. The system proved to be popular with purchasers of real estate, and with many of the lawyers. A great deal of money is now loaned here by Northern and Eastern investors, including the insurance companies, most of whom use the title guaranty policies as evidence of title.

When I say that the system of guaranteeing titles now receives the support and approval of a good many of the lawyers, I have in mind the fact, which I believe existed wherever the system has been started, that some of the attorneys at first were much opposed to the idea, and some still are. Some attorneys seem to think that this system comes very near to that of a corporation practising law, which of course is not the case at all. In our handling of the business we have received the good will of the best members of the bar, who frequently recommend that a client have his title guaranteed. The Bank of Commerce & Trust Company, being situated in Memphis, which is in the southwest corner of Tennessee, northwest corner of Mississippi and just across the Mississippi River from Arkansas, handles business in all three States, so that we have to employ quite a staff of attorneys.

Rates are about the same as those of eastern companies, and what

may be called the Standard Title Policy is used, that is to say a real guaranty, not excepting practically everything upon which a liability could be predicated.

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## IS THE AMERICAN SYSTEM OF LAND TRANSFER HEADED FOR THE SCRAP HEAP?

(By W. H. Winfree, President of Northwestern Title Insurance Company, Spokane, Washington.)

This is not a new question, nor did the thought suggested by it originate with me. The committee on legislation of the American Association of Title Men for 1913 was composed of men from different sections of the United States, each as able a man as the title world has ever known. That committee's report, which will be found at page 141 of the printed proceedings of the 1913 convention, opens with the following statement:

"We are passing through a critical period in the history of land titles in this country. There is a wide-spread feeling of dissatisfaction among lawyers and laymen, with some of the features of our present system of land transfer. The vast accumulation of records, the numerous defective instruments, the many technical requirements of the law and the conflicting decisions of Courts all tend to render the abstracting and examining of titles burdensome and tedious, and to render the titles themselves unsafe and uncertain.

"This is doubtless the cause of the present agitation looking to the adoption of the Torrens plan of title registration. Your committee is of the opinion that the Torrens system is a fallacy: That it is based upon a wrong principle; that it is not adapted to conditions in this country; that its most vital feature is in conflict with the Federal Constitution, and finally, that in its practical results as indicated by the experience of States which have adopted it, it is a complete failure.

"We believe that in its simple essentials, our present system is the best that can be devised; but it is burdened with so many useless technicalities that unless it can be greatly modified it is in danger of being crushed under its own weight.

The object of the legislative program which we are suggesting is to remove the objectionable features of the system and thus render land titles simpler and more secure."

The scrap heap is the inevitable landing place of every device, plan, method, and procedure used in our business life which is not improved and developed to keep pace with the advance of human achievement. No improvements or changes of any consequence have been made in the American system of land transfer since colonial days. A few of the most aggravating technicalities have been removed in most of the states, such as private seals, the separate acknowledgment of the wife, etc.; but on the whole, the system is the same as it was in the Colonies one hundred and fifty years ago. Can the reader bring to mind anything else in the American business life which has undergone such slight modifications? Our present day business is keyed



to the wireless and the aeroplane, the business of the Colonies was keyed to the ox-cart and the pony express.

The abstracter has simplified the method of finding instruments and proceedings affecting titles, and separates for the examiner the wheat from the great mass of chaff and straw. The title insurance company has given some relief in the more congested district. But neither the abstracter nor the title insurance company can, without the aid of the lawmaker, do away with the technicalities of antiquated laws, the conflicting decisions of the courts, the hardships imposed by the dual notice, record and possession. These, and many other requirements of the system, have no place in our present day needs, but no relief can be had therefrom short of legislative enactments.

Every business and every business man is interested in the simplicity and security of real estate titles, but none so keenly as the title man. Has not the public the right to look to the title man, as being the one best posted on this subject, for relief from title troubles?

If the title men delay too long may not our system of land transfer be "crushed under its own weight"? Look at what happened in California! The title men in that state were on the defensive, proposing nothing new, only asking to be let alone. They were successful in fighting proposed Torrens laws in the legislature, but a Torrens law was foisted on the people by a change in the constitution through the Initiative, and that law can now only be changed or repealed by a similar initiative. After this constitutional amendment was passed the title men of California woke up. They are now doing things. They have succeeded by live, active, and aggressive movements in improving the system of land transfer and in educating the public to the advantages thereof. They have stemmed the Torrens tide which was about to destroy the safety and stability of real estate titles in California.

But why wait until the unadvised public takes some action such as was done in California? Why not be on the aggressive? Why not be a positive factor instead of a negative body?

No title man needs to be told that the Torrens advocates are aggressive, and every man and woman who has had title troubles—and their name is legion—is ready to lend a willing ear to the Torrens sophistry. That system is not adapted to our institutions; but remember, the Torrens' advocates are enthusiasts, energetic and resourceful. They are constantly modifying their system and, unless the title man points the way to relief out of the jungle of technical requirements, conflicting decisions, etc., they will so alter their procedure as to de-

velop an entirely new method, and to give a seeming relief under the old name.

It was but recently that a prominent title man of a nearby state said to me that he wished they had allowed the first Torrens bill introduced in his state to become a law; that when such bills had become laws the public readily saw their weakness and impracticability; but that the Torrens' advocates were changing their plan and were now proposing measures which might be generally accepted by the public.

The title man knows that real estate is the foundation of all wealth, and that stable titles are essential to the stability of a community; that no place or community will prosper or make progress unless it has certainty and security in its titles. He knows that the American system of land transfer is the best method ever devised for evidencing titles, that it gives the greatest stability to real estate. He knows that the title man is the "Hub" of that system, without which the wheel could not turn; that around him revolves the interests of home ownership and the holdings of the business world. But has he told these things to his neighbor?

The title men need to shake off this inertia and to abandon the watchful waiting policy, the complacent let-alone policy, and choose instead an active wide-awake program, one that will advise the public of the advantages of the American system of land transfer, and at the same time remove therefrom the unnecessary technicalities and burdens and save the system from the scrap heap.

Will the title men awaken? Will they shoulder their obligation to the public and make "land titles simpler and more secure"?

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### SOME CONSTRUCTIONS OF TORRENS LAW.

The Torrens system was, of course, wholly unknown to the common law and equity. It is strictly a system created, established and governed by statute. Under the system what must be done, the manner in which it must be done, by whom, and the effect, are to be determined by the provisions of the particular act. Hence the duties and powers of the registrar are these imposed or conferred by the statute, and he may not do acts or exercise powers other than as therein provided howsoever the latter may seem proper or be apparently necessary to effect what may be deemed to be the object of the system. And it follows unauthorized acts are void of effect. This is shown by a recent case.

The title, duly registered, to certain property was acquired by a purchaser who applied to the registrar to have title registered in himself. On the owner's certificate and the duplicate issued by the registrar

pursuant to this application, there were noted as memorials certain special assessments, and various warrants purporting to have been confirmed and levied on the property or portions thereof. It was also noted that certain installments of some of these assessments had become delinquent, and some of the property had been forfeited on account of delinquencies. No transcript of any judgments confirming these assessments, nor of any judgment and order of sale under authority of which the forfeitures were entered, nor any certificates of any of the forfeitures had been filed in the office of the registrar. None of these matters appeared on the certificate of the registered owner of the lots at the time the deed to the purchaser had been filed with the registrar, and the purchaser had no knowledge or notice of these assessments or forfeitures prior to their entry as memorials on the certificate issued to him. They had been found by the registrar and entered by him as memorials, after he had made a voluntary search of the records in the office of the county clerk and of the various courts of the county for the purpose of ascertaining whether there were any assessments or other matters that might be made charges against the property. The purchaser, or the registered owner upon whose certificate these memorials had been entered, and upon whose title they constituted clouds depreciating the market value thereof, petitioned the court to compel the registrar to cancel and expunge them from the certificate, and that the registrar be required to register the title free and clear thereof. The court in this case said:

"There is no section of the act that authorizes the registrar to search for liens or charges of any kind, and of his own voluntary motion to note upon the certificate of title and the owner's duplicate certificate memorials of such charges or liens. A consideration of the act shows clearly that it was the intent of the Legislature that no memorial of any charge, lien or claim should be entered by the registrar without due proof before him that the instrument is a proper charge, lien, or claim against the land, and that the person presenting the instrument shall make such proof and also that he is the owner of the instrument.

"There is one section of the statute that authorizes the registrar to note memorials on certificates of title when made by him, and it only authorizes him to carry forward from all former certificates such memorials and notations as were entered on such certificates and not cancelled in some manner authorized by law."

The court held statutory provisions prescribing the manner in which an owner of a lien, charge, or claim may proceed to charge registered property and make his lien effective are mandatory, and must be followed strictly in order to obtain such liens against registered land. It also held that the voluntary act of the registrar in entering the memorials in question on the certificate was unauthorized, and could not be held to create liens or charges on the owner's land, not being proved and entered in accordance with the provisions of the

statute. "To sanction", said the court, "such practices would necessarily invite many other such unauthorized acts of the registrar which would precipitate a multiplicity of suits to protect rights of registered owners." (*Curtis v. Haas*, 131 N. E. 702, Ill.)

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Where two lots are occupied by a building, a court is warranted in denying an application to register, under the Torrens system, title to one of the lots as not proper for registration. (*American Nat. Bk. v. Chapin*, 107 S. E. 636 Va.)

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### ORIGIN OF MECHANICS' LIENS.

The history of the origin of mechanics' liens is of peculiar interest. Mechanics' liens had no existence under the common law and were not allowed in equity. They are wholly created by statute. The selection of the District of Columbia as the seat of the government of the United States, and the consequent necessity of establishing and developing as expeditiously as possible the city of Washington, brought to pass the enactment of the first law providing for these liens. At a meeting of the commissioners appointed to establish that city, held September 8, 1791, at which Thomas Jefferson and James Madison were present, a memorial was adopted, addressed to the General Assembly of Maryland, in which it was stated: "Your memorialists conceive it would encourage master-builders to contract for the erection and furnishing houses for certain prices agreed on, if a lien was created by law for their just claims on the house erected, and the lot of ground on which it stood." The General Assembly promptly acted, passing a law to effect the object sought that same year,—December 19, 1791. Pennsylvania followed this example in 1803. Original acts, like these mentioned, were designed to protect only principal contractors, but wrongs perpetrated upon sub-contractors and workmen induced the gradual expansion of the scope of the law to afford the latter protection also. (*South Fork Canal Co. v. Gordon*, 6 Wall, 561, 18 L. Ed. 894; *Phillips, Mechanics' Liens*, 2d ed. sec. 7; *Acts Genl. Assem. Md.*, 1791; c. 45; *Penn. Act*, Apr. 1, 1803.)

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### CONCERNING LIABILITY.

A recent decision in Massachusetts was based upon these facts: The plaintiff in the case had contracted to buy certain real property which was to be conveyed to him by warranty deed free of incumbrance except a certain mortgage. He delivered his contract to the defendant title insurance company, advising it of his purchase, and directing examination of the title according to the contract, adding,

"That tells you the whole story." He did not ask for title insurance. Later, on inquiring when the title would be "passed", he was asked if he wanted the title insured. He replied, in substance, he thought it unnecessary to incur the expense thereof if the title was clear but assented when told he could have the insurance for the amount paid for examination of title. When the papers were "passed" he did not ask nor was he told that the title was clear, and no abstract of title was read to him. He received from the defendant insurance company a receipt specifying that it was for money paid by him as a charge for "passing" the papers and examination of title. He accepted a warranty deed of the premises purporting to convey the same free of incumbrance except the specified mortgage. A policy of title insurance was issued by the defendant insurance company which insured the plaintiff title free of incumbrance, except the mortgage and except a right of way, but the policy was not delivered until about three months after the papers had been "passed." The easement for the right of way existed and was an incumbrance on the land, but the plaintiff was not aware of it until nine months after he had acquired title, when he then, for the first time, examined the policy and found it was excepted therefrom, but not from the deed. He thereafter brought an action against the insurance company. The latter contended that its sole liability was that of an insurer, and its obligation was measured by the terms of the policy. But it was held that this contention was without merit; that the defendant insurance company had acted as plaintiff's paid agent in examining the title, and was negligent in failing to disclose the existence of the right of way to plaintiff, who was ignorant of its existence until after he had paid his money and obtained his deed which was silent as to the easement, and who had relied solely on the defendant to protect his interest. *Dorr v. Massachusetts Title Ins. Co.* 131 N. E. 191.

When an abstract company accepts deeds which, if genuine, will operate to vest title in a grantee, and also a mortgage executed by that grantee to a mortgagee, and the mortgagee's check for payment of the amount to be secured by the mortgage, with instructions to deliver the check to the mortgagor "when the title is" vested in him, the abstract company's liability is not restricted to seeing that the mere record title is in the mortgagor. Hence, if the deeds are forgeries but the company relies on them as genuine, and delivers the check or pays to the mortgagor the sum advanced by the mortgagee, it is liable therefor. Furthermore it appears that where notaries are appointed in and for a county, and records of such appointments are kept, by provision of law, by some specified county officer of the county, an abstract com-

pany with respect to such a transaction, where the certificates of acknowledgements of the instruments purport to be made by a notary in and for the county, is charged to examine such records to ascertain if the notary is disclosed to be one by such records. *Hopkins v. Fresno County Abstract Co.*, 173 Pac. 106.

A recent action against an abstract company for damages arose from an unusual circumstance. A new county was created out of and by division of an original county. After the creation of the new county an instrument affecting premises therein situate was recorded in the office of the register of deeds of the original county. Quite some time subsequent to the creation of the new county the records of the original county affecting title to land within the new county were transcribed and filed with the register of deeds of the new county, and declared, as provided by statute, by the duly constituted authority to be the records of the latter county. The instrument above referred to was one of these transcribed records. An abstract company in the new county continuing an abstract of title to premises affected by the instrument failed to show the latter, assuming no instrument affecting title to land in the new county after its creation would be filed in the original county, and not making a search of the transcribed records. Damages accrued to the plaintiff on account of the omission of the instrument from the abstract. The abstract company contended that the record of the instrument in the original county after the creation of the new county, did not operate as constructive notice. But it was held that it was not the duty of an abstracter to determine whether instruments are valid or invalid, or whether or not instruments are entitled to be recorded, or do or do not impart constructive notice, but that it is the duty of an abstracter to show the facts disclosed by the record. And as the instrument was of record by transcription in the new county when the abstract continuation was made, there was no excuse for its omission therefrom. *Martin v. Divide County Abst. Co.*, 183 N. W. (no 8 Ad. S.) 106.

Abstracters may make mistakes for which they may not be held accountable. But they cannot proceed to take advantage of their mistakes, and of their knowledge, skill and advantageous position in regard to the subject matter, and secure outstanding titles and use these to destroy or impair the rights of those who trusted in them. So where an agent of a loan company, who was also an abstracter, negotiated a loan to be secured by a deed of trust upon property which was already subject to a deed of trust given by a prior grantor, and furnished an abstract to his principal which was defective in that it did not show this latter deed of trust, such agent afterwards acquiring title to the

property at a foreclosure sale under the omitted deed of trust was held estopped to assert any title as against his principal. *Marston v. Carterlin*, 239 Mo. 390, 144 S. W. 475.

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#### NEW YORK STATE TITLE CONDITIONS.

(From address of Mr. Cyril H. Burdett, Vice-President, New York Title and Mortgage Co., at organization meeting of New York State Title Association.)

In New York State there are eleven corporations organized under the laws of that state for insuring titles to real estate and guaranteeing of mortgages. Seven of these are located in New York City, two in Westchester County, and two in Buffalo. Two of the seven in New York City and one of the two in Westchester County do not insure titles, but guaranty the payment of mortgages. The combined capital and surplus of these eleven companies is \$60,360,209.44. The capital and surplus of the companies engaged in title insurance is \$37,822,289.99. In 1919 the amount of the outstanding mortgages guaranteed by the title companies in New York City and Westchester County was over \$121,000,00; and the amount of these guaranteed by the mortgage guaranty companies was over \$520,000,000.

The number of titles registered under the Torrens law in the various counties of New York City until a recent date were as follows: New York County, total thirty-six, of which eleven were registered during 1920, and one in 1921. Of the total five were withdrawn, when the law permitted withdrawal; two have been canceled by order of court, and seven are re-issues. There are, in consequence, outstanding certificates affecting only twenty-nine parcels. In Kings County sixty-nine certificates have been issued, forty-six of these original and twenty-three re-issues. In Queens County forty-seven certificates,—two of these re-issues,—twenty issued during the year 1920, and nine in 1921. In Richmond County, six certificates, one a re-issue. In Bronx County, thirty-four certificates, nineteen original and fifteen re-issues. Thus during the eleven years the Torrens law has been in effect in New York State, one hundred forty-three parcels have been registered in New York City. During 1920 there were 78,794 transfers in New York, Bronx and Kings counties, so the Torrens law had but negligible effect.

In most of the counties of New York searching records and making abstracts is almost entirely done by county clerks, and is regarded as one of the prerogatives of that office. There are about fifteen incorporated abstract companies in the state.

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The Lawyer and Banker is frequently asked to what companies inquiries for sample forms of title insurance policies may be addressed. Most all of the title insurance companies are glad to furnish sample policies to any one interested in forming an insurance company, or to a prospective customer. Forms similar to those used by the Chicago Title Trust Company have been adopted by concerns in the middle west. Mr. W. H. Winfree, President of Northwestern Title Insurance Company, Title Building, Spokane, Washington, has a combination owner's and mortgagee's policy that is unique and simple.

## THE ABSTRACT OF TITLE.

By Phil Carspecken, Burlington, Iowa, (Des Moines County Abstract Company.)

Making abstracts is a dry, prosaic calling, well we know,  
Delving dally into records made a century ago,  
Tracing wearily the title from the Patent down to date,  
Thru the maze of suits and transfers that obscure and complicate;  
Yet for me there's fascination in thus working in the past,  
And on all the seeming drudg'ry there's a kind of glamor cast,  
For there's poetry and romance running thru the tangled chain,  
And there's written in the record much of human joy and pain.

For, like Gibbon and Macaulay, we're Historians, in our way,  
And we bring to light transactions of a gone, forgotten day,  
True, we only sketch the outline, but behind it all there lies  
Quite a bit of human interest that our fancy well supplies;  
And I love to let that fancy freely roam and weave a tale  
About every deed and mortgage, into each judicial sale;  
For the records deal with pioneers and homestead farms and homes,  
And we garner many heart-throbs from those dry and musty tomes.

For in every grim foreclosure lurks a heart-ache, and we sense  
In the Bankruptcy Assignments human misery intense:  
There is grief in every tax sale, and we seem to hear the wail  
Of the widow and the children robbed of home by Sheriff's Sale.  
Delving thru the Court proceedings we find interwoven there,  
Couched in formal, legal lingo, much of sorrow and despair,  
And we live again thru all the trials of folks of long ago—  
Running thru the chain of title there's a deal of human woe.

The estate files, torn and tattered—there's a certain something there  
That is sacred, and we handle them with reverence and care,  
And they help us to determine how the owner's life was spent,  
For he often bares his soul in his Last Will and Testament.  
And in running thru Partition Suits there plainly will be seen,  
In the squabbles of the children, much that's grasping, low and mean,  
For in fighting for a dead man's wealth the baser feelings breed—  
Running thru the chain of title there's a deal of human greed.

And in poring o'er the records that pertain to real estate,  
Setting forth the imperfections that impair and complicate,  
Comes the thought of my soul's record, and the mess I've made of it,  
And I long to change some things that the Recording Angel's writ;  
And I wonder, when the tangled chain is done, and I have died,  
And the Abstract of my Life is duly closed and certified,  
And the Great Exam'ner scans each fatal flaw and grave defect,  
Will He waive those imperfections in my record—or reject?

## PENNSYLVANIA TITLE INTERESTS ORGANIZE.

The title men of the Keystone State have been slow to organize, but when they did assemble for that purpose the meeting was an unusual one. It can be said without fear of contradiction that the meeting at Harrisburg, November 15, that resulted in the formation of the Pennsylvania Title Association, brought together representatives of more companies doing a title business and possessing extensive resources than any other state meeting so far held. The new organization resulted from the efforts of John E. Potter, president of Potter Title and Trust Company of Pittsburgh, who sent out the call for the meeting and pointed out the advisability of an



organization. A luncheon at noon initiated the meeting, after which a constitution and by-laws for the association were adopted and officers afterwards elected. The report of the commission to revise the state banking laws of Pennsylvania with respect to its effect upon title insurance was discussed, as also what should be the attitude and policy of title insurance companies with regard to the Torrens system and legislation. Henry R. Robins presented a report on the Board of Title Underwriters of New York City, which was much debated. The objects of the new body as specified in its records are as follows: "The purpose of this association shall be to afford to all corporations formed for the purpose of examination or insurance of titles to real estate opportunity for conference upon matters of mutual interest, and to protect owners of real estate in Pennsylvania from legislation affecting the stability of titles to real estate and to assist in securing legislation beneficial to ownership of real estate." Membership in the association "shall consist of corporations organized under the laws of Pennsylvania, having power under their charters to insure titles to real estate." Officers elected were: President, John E. Potter of Potter Title and Trust Company of Pittsburgh; vice-president, John E. Umsted, vice-president of Continental Equitable Title and Trust Company of Philadelphia; secretary, Henry R. Robins, vice-president of Land Title and Trust Company of Philadelphia; treasurer, T. E. Lewis, secretary of Media Title and Trust Company of Media. Sheldon Potter, president of Chelton Trust Company of Germantown, was made chairman of the executive committee, and James R. Wilson, vice-president of Real Estate Title Insurance and Trust Company, was made chairman of the legislative committee of the organization.

The first title insurance company in the world was organized at Philadelphia on June 24, 1876, and that company, The Real Estate Title Insurance and Trust Company, is a member of this association. The great experience of this company, and that of other members of this state organization, give promise of policies and actions that can be observed with profit by similar state associations in other parts of the country. And no state has as many title insurance companies as there are in Pennsylvania. The following companies were represented at the meeting by the officers named, and became members of the association:

Bryn Mawr Trust Company, Bryn Mawr, P. A. Hart, president; Cambridge Trust Company, Chester, William S. Blakeley, Jr., assistant title officer; Central Trust and Savings Company, Philadelphia, Anson B. Evans, title officer; Chelton Trust Company, Germantown, Sheldon Potter, president, and Lester E. Pfeifer, title officer; Chester County Trust Company, West Chester, George S. Roberts, title officer; Columbia Avenue Trust Company, Philadelphia, Edwin Booth, title officer, and Henry P. Schneider, director; Commonwealth Title Insurance and Trust Company, Philadelphia, Malcolm Lloyd, Jr., president, James P. Pinkerton, assistant title officer; Continental Equitable Title and Trust Company, Philadelphia, John R. Umsted, vice-president; Delaware County Trust Company, Chester, John H. Clark, assistant title officer; Farmers' and Merchants' Trust Company, West Chester, Herbert P. Worth, president; Germantown Trust Company, Philadelphia, E. A. Waters, trust officer; Haddington Title and Trust Company, Philadelphia, Louis S. Neidig, Jr., title officer; Integrity Trust Company,

Philadelphia, William C. Byrnes, title manager; Kensington Trust Company, Philadelphia, Mortimer N. Eastburn, title officer; Land Title and Trust Company, Philadelphia, Henry R. Robins, vice-president; Market Street Title and Trust Company, Philadelphia, Harrison N. Diesel, vice-president, John B. Waltz, title officer, and Ormond Rambo, solicitor; Media Title and Trust Company, Media, V. G. Robinson, president, A. S. Peterson, title officer, and T. E. Lewis, secretary; Mutual Trust Company, Philadelphia, Winfield S. Caldwell, title officer; Ninth Title and Trust Company, Philadelphia, Guy C. Bell, title officer; Northern Central Trust Company, Philadelphia, Walter Gabell, president, and William E. Schubert, title officer; Norristown, Montgomery Evans, president; North Philadelphia Trust Company, Philadelphia, W. J. Snyder, title officer; Penn Trust Company, Norristown, C. H. Alderfer, president, and Charles H. Brunner, title officer; People's Trust Company, Philadelphia, George C. Bowker, president; Potter Title and Trust Company, Pittsburgh, John E. Potter, president, and Mark R. Craig, title officer; Real Estate Title Insurance and Trust Company, Philadelphia, Francis A. Lewis, president, Daniel Houseman and James R. Wilson, vice-presidents; Title Guaranty Company, Pittsburgh, S. H. McKee, president; Union Fidelity Title Insurance Company, Pittsburgh, Hugh M. Patton, title officer; Wayne Junction Trust Company, Philadelphia, Wayne P. Rambo, title officer, John J. Collmer, assistant title officer; West Philadelphia Title and Trust Company, Philadelphia, Franklin Chandler, title officer; Wayne Title and Trust Company, Philadelphia, Frederic B. Calvert, title officer; Merion Title and Trust Company, Ardmore, Henry C. Bare, title and trust officer.

Thirty-two companies in all were represented.

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#### TITLE INSURANCE RATES.

The charges of the Louisville Title Company of Louisville, Kentucky, for insurance of title, including examination of title, closing the transaction, etc., unless unusual difficulties are encountered, in which case an additional charge is made, are as follows: For property situate in Louisville, or Jefferson County, the minimum rate is \$20, for values up to \$500, additional value up to \$2,000, at the rate of \$1.00 per \$100 in addition to the minimum rate; additional value from \$2,000 to \$30,000 at the rate of \$5.00 per \$1,000. Above \$30,000 the rate is less,—specifically for \$500 or less, \$20; \$700, \$22; \$1,000, \$25; \$2,000, \$35; \$3,000, \$40; \$10,000, \$75; \$30,000, \$175. This company is organized under the laws of Kentucky to insure titles, and has a capital of \$500,000, and a surplus of \$150,000. It now operates an escrow department.

Title Guaranty and Trust Company of Chattanooga, Tennessee, charges \$29.50 for title insurance on property worth \$2,500. Other charges in proportion.

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Federal land banks are authorized in a bill introduced by Chairman McFadden of the House Banking Committee to establish a syndicate to market their securities. The measure would sanction creation of a Federal loan investment company on application of seven or more of the twelve farm loan banks, among which the corporation's capital, to range between \$500,000 and \$1,000,000, would be prorated.

## ABSTRACT RATES.

The abstracter's associations in Iowa and Washington investigated, during the past year, the matter of charges for abstract work made by their respective membership, and reports upon the matter were presented at their conventions. The data is interesting, and particularly so when that of one is compared to the other.

The Iowa report discloses that fees in that state are wholly fixed on a per transfer basis as to instruments. As to court proceedings charges vary, as also the method of abstracting such matters. The charge for instruments ranges from 40 cts., the minimum, to \$1.00, the maximum, intermediate prices 50 cts., 60 cts., 65 cts., 70 cts. and 75 cts. The rate of thirty-one of the companies or individuals reporting was \$1.00, that of twenty-seven was 75 cts., and only fourteen reported the lesser fees above mentioned of 70 cts. and under. There is no uniformity among the companies of charges for certificates to abstracts, which range from \$1.00 to \$5.00. This variation is in part explained by the fact that some companies include in and as part of the certificates reports as to judgments and taxes, which other concerns deem separate items. The former charge the higher certificate rate, and the latter the lesser rate. Thus many charge \$1.00 each for judgments, tax sales and certificate, or \$3.00 in all. Some add to their usual fees in cases of valuable property, and make deductions as to cheap property. As to court proceedings the report states that, in some localities, attorneys seemed to demand much copying instead of abstracting, and that on some occasions full transcripts have been required. Brief abstracting, however, of judicial proceedings showing all essentials was found quite generally acceptable to attorneys and was recommended. And the report states: "The lengthy abstract in many cases does not help the title, does not make us any more money, and certainly hurts the business."

The report to the Washington (State) Association of Title Men is comprehensive, and based, as was the Iowa report, on questionnaires sent the members. This report was the result of the labor of Nathan P. Myhre, vice-president and manager of The Fidelity Abstract Company of Seattle. It discloses that many abstract companies were allowing and paying commissions ranging from 10 to 33 1/3 per centum. Sixteen companies doing business in counties having a population less than 100,000 include in their certificates reports as to judgments, taxes and special assessments, making one certificate charge for the whole. Fees for certificates vary among these companies,—\$1.00, \$1.50, \$2.20, \$2.50, \$3.00, \$3.25, \$3.50. Their charges for instruments also differ,—75 cts., 82.5 cts., \$1.00 or \$1.25, and one company's rate is 90 cts. per page. They likewise have a varying schedule of fees for abstracting court proceedings; thus, per abstract page thereof, 40 cts., 50 cts., 75 cts., 82.5 cts., \$1.00; and one company fixes its fee at a lump sum per suit or action, not making a rate per abstract page, with a minimum of \$3.00. The schedules of specific companies of this group are as follows: Certificate, \$1.00; instruments 75 cts. each; court cases 75 cts. per page. Certificate, \$3.50; instruments \$1.00 each; court cases \$1.00 per page. Certificate, \$3.25; instruments \$1.25 each; court cases \$3.00 each and upward.

The other group of abstracters in Washington doing business in counties having a population of less than 100,000, who reported, numbering eighteen, segregate their certificate charge, making it one item, and judg-

ments, taxes and assessments (taxes levied for local improvements as distinguished from general taxes for governmental purposes,) separate fee items. Certificate charges of members of this group are not uniform, some fixing it at \$1.00, others \$1.50, \$2.00, \$2.50, \$3.00. Other fees also vary, thus: instruments, each 75 cts., \$1.00, \$1.25; judgments, 25 cts., 50 cts. and 75 cts. per name, while some companies fix their fees for this item at a lump sum without respect to the number of names and charge 50 cts., \$1.00 and \$1.50 "for full judgment search", and one company gives its rate as 75 cts. "per page"; tax search, 25 cts., 40 cts., 75 cts. per year, 50 cts., \$1.00 for full search; special assessments, 25 cts., 50 cts., 75 cts. for each assessment, 50 cts., \$1.00 for complete assessment search, 75 cts. "per page"; court proceedings, 75 cts. and \$1.00 per page, all charging the latter rate except four companies. Schedules of specific companies in this group are as follows: Certificate, \$3.00; instruments, each, \$1.35; judgments, taxes and assessments, \$1.50; court cases, \$1.00 per page. Certificate, \$3.00; instruments, each, \$1.00; 50 cts. for full judgment and tax search; \$1.00 for full assessment search; court cases \$1.00 per page. Certificate, \$1.00; instruments, each, \$1.00; judgments, 50 cts. per name; tax search, 50 cts.; assessments search 25 cts.; court cases \$1.00 per page. Certificate, \$2.50; instruments, each, \$1.00; judgments, 25 cts. per name; tax search 40 cts.; each assessment 25 cts.; court cases \$1.00 per page. Contrasted with the latter is this schedule; certificate \$2.00; instruments, each, \$1.25; judgment, per name, 50 cts.; tax, per year, 25 cts.; court cases, \$1.00 per page.

The companies doing business in counties having a population of 100,000 and over have schedules as follows: One company, certificate \$1.25; instruments, each, \$1.25; judgments, per name, 25 cts.; tax and assessment search \$3.75; each court proceeding, \$12.50. Two other companies for certificate 90 days or less, \$2.00, up to five years, \$3.50, and \$5.00 for over five years, including judgment, tax and assessment searches; \$1.00 per instrument, and \$1.00 per abstract page of court proceedings. The other three companies in this group charge \$2.50 per certificate; \$1.50 for each instrument; 50 cts. per name for judgment searches; 25 cts. per year for tax search, with a minimum of 50 cts. and \$4.00 maximum for a complete search; 50 cts. for each assessment, and \$1.00 per page for court proceedings.

This report, reviewing at length the various schedules, recommended to the association the "following as a fair and reasonable schedule of rates to be charged":

In counties of less than 100,000 population, certificate, \$2.00; instruments, \$1.00; judgment searches, each name, 50 cts., with a minimum of \$1.00; taxes, per year, 25 cts., with a minimum of 50 cts., and a maximum of \$3.00 for a full search; assessments, each, 50 cts.; court cases, \$1.00 per page, with a minimum of \$3.50.

In counties having a population in excess of 100,000, certificate, \$3.50; instruments, \$1.50; judgments, per name, 50 cts., minimum charge, \$1.00; taxes, per year, 25 cts., minimum 50 cts., and a maximum of \$4.00 for a complete search; assessments, 50 cts. each; court cases, per abstract page, \$1.50; with a minimum charge of \$5.00.

Touching upon another matter the report states: "In regard to duplicate copies it appears that the majority of the companies charge one-half for the second copy (of the charge for the first). I believe that this should

be raised and a charge of two-thirds made for the second entry, and one-third for the third, or three for double the cost of one. It is just as easy to get two-thirds as one-half, and you know that you are entitled to it. Every copy made keeps you from making a complete abstract later on, and the only saving by making copies is the expense of typewriting. Do not make a large number of abstracts at a low price. Several months ago I was told of one company that certified 75 complete abstracts at \$1.00 each, the client paying the cost of printing. Each abstract figured about \$40.00 at the current rates. The company should have received not less than \$3.00 each for this work, and I know that the client would have paid the bill." The report recommended billing in lump sums, stating: "When you itemize your bills you charge \$1.00 to \$1.50 per instrument, and so on, but make no charge for service, and service is the most expensive part of the abstract. It is no wonder that your client feels, as if he was being overcharged. If you were to segregate your charge and include your charge for services then the charge for each instrument would be considerably less, and your client would have no reason for complaint. By lumping your charges into one your client's attention is called to service rendered together with matters shown in the abstract."

The report sets forth the fact that "curbstoners" operated in nine counties, and referring thereto comments: "I do not believe that it is necessary to cut rates or give commissions to combat this evil. The curbstoner will lose prestige and business when you disregard him and attend to your own affairs, charge rates to earn a reasonable return on your investment, and put up a prosperous appearance and give the best service possible." Rebates and commissions were condemned: "There are no logical reasons for the payment of commissions, and in many cases the companies violate the law in so doing."

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#### STATE ASSOCIATION CONVENTIONS.

The fourteenth annual convention of the Texas Abstracters' Association was held at Fort Worth, Texas, on the same dates as the second annual convention of the Texas Association of Real Estate Boards, October 17 and 18. Seventy-eight abstracters and one hundred and forty-four realtors registered. Judge M. H. Gossett, president of the Federal Land Bank at Houston, spoke on the "Federal Land Bank in Texas, Its Past, Present and Future," outlining the work of that institution, and suggesting ways and means for closer co-operation between the bank and abstracters. J. P. Cogdell, title examiner for the Mutual Home Association, reviewed recent judicial decisions an abstracter should know. "Co-operation Between the Realtor and Abstracter" was the subject of an address by Lawrence Miller, president of the Texas Association of Real Estate Boards. Sidney L. Samuels, an attorney of Fort Worth, told of the necessity for co-operation between the title examiner and abstracter. The retiring president of the abstracters' association, Lewis D. Fox, had donated a silver cup to be awarded the one exhibiting the best abstract, and it was awarded W. A. Stroman, of Tom Green County Abstract Company, by a committee of three members of the Fort Worth bar, selected to make the award. Visiting ladies were entertained at luncheon and at a theater party the second afternoon of the convention. Delegates and their friends were taken for a thirty-five-mile

drive around Lake Worth, ending at the Shrine Mosque, where a box lunch was served. The Lone Star banquet, held the second evening, was attended by two hundred and fifty delegates and their friends. This was one of the best attended and most harmonious meetings of the Texas association, and it is probable that a joint convention of the two associations will be held at the same place next year. The convention adjourned to Dallas, where delegates were entertained at luncheon and taken to the Texas State Fair as guests of Dallas abstracters and realtors. The Texas Abstracters' Association has a membership of one hundred and thirty-nine. Officers elected are: D. H. Culton, Tullia, president; Ben C. Love, Franklin, vice-president; Miss Clara Ueltschey, Tullia, secretary.

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The Washington Association of Title Men held its eighteenth annual convention at Ellensburg, October 29, at the invitation of one of its members, Jay A. Whitfield, attorney-at-law and manager of Kittitas County Abstract Company of that city. The program for the meeting had been arranged by Horace Fogg, president of the association. A new method of photographing instruments that is to be used in Pierce County for the purpose of recording, instead of the ordinary one of copying, was explained by Almon L. Swanson. This photographic process permits of the reproduction of an instrument on any scale, from one minute dimensions up to one many times larger than the instrument itself. Using this system, it is proposed to photograph instruments in succession on a reel of films, in width less than two inches, so that a great number of instruments can be contained on a reel that will be encased in a metallic container of the size of an ordinary small bottle of ink. Then photographic copies of instruments of about the same size of the instrument will be made for usual use in lieu of recordation. The small tin containers will be stored and held for reproduction of any instrument lost, damaged or destroyed. Using this system, the records will present for future use and inspection fac-similes of matters left for record, and permit of examination of signatures or chirographic features that are of particular importance in certain cases, such, for example, as forgery. Mr. Swanson analyzed this method at length as of interest to abstracters, because of its possible effect in the future upon abstract methods. Sidney A. Cryor, chief examiner of the Federal Land Bank at Spokane, explained the system of that bank in dealing with abstracts and titles, and gave a hearing to complaints and queries, and answered them. W. H. Winfree, president of the Northwestern Title Insurance Company of Spokane, who is a member of the State Legislature, gave not only an interesting, but also an instructive address on his observations and experiences as a legislator at the last session of the Legislature. The program of the American Association of Title Men, at its last convention, was analyzed and reviewed by Worrall Wilson. He pointed out that investors, farm mortgage bankers, savings and loan associations and realtors were represented by speakers on the program. F. C. Hackman, the delegate of the state association to the national convention, related various matters that had come within the range of his inquiries and attention while in the East. A report on abstract rates in the state was made by Nathan P. Myhre, one of a committee that had been appointed to investigate the subject. This report is one of such general

interest to title men that it is quite fully presented to readers elsewhere in this issue under the caption "Abstract Rates."

Officers elected for the ensuing term are: A. Burnham, president; Earl B. Harren, vice-president; Nathan P. Myhre, second vice-president; Robert W. Elwell, secretary-treasurer. The latter gentleman has held that office for several terms, and his re-election was a tribute of appreciation of his diligence and efficiency.

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The United States Treasury Department has recently made a ruling on Section 214, (a) 1, touching the matter of deducting and allowing a business expense in the way of Income Tax returns.

This opinion also covers the ruling in Section 214, the section above referred to, Article 162 is as follows:

"Title abstract companies incur relatively large and continuous expenditures in keeping their plants up to date, such as the expense of adding and incorporating in the plant records that are being made daily in the various courts and in the Recorder's office.

"These records, which are added to and incorporated in the plant for the purpose of keeping it in up to date running order and preventing depreciation, are in the nature of ordinary and necessary repairs. The expenses, therefore, incurred in making such records are current expenses, and as such are deductible for the year in which incurred and paid or accrued.

"Since a title plant is not an asset of a nature which gradually approaches a point where its usefulness is exhausted, but is an asset of a more or less permanent character, it is not a proper subject of a depreciation allowance."

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#### TITLE LAW BREVITIES

It is undisputed that a deed is presumed to have been delivered upon the day it bears date. It is also unquestioned that an unrecorded deed duly delivered takes priority over a judgment in the absence of fraud or other superior equity. But the mere fact that a deed bears a date a day prior to the rendition of a judgment against the grantor, does not make the title one free from doubt, but rather suggests strongly the possibility that the transfer was made to defeat the judgment, and hence that the title is not marketable. A vendee cannot be compelled to take a title presenting such a question that will require parol evidence to establish. (*Tausk v. Stry*, 110 Misc. Rep. 514, 180 N. Y. S. 439.)

Mortgages given in good faith to secure future advances, either in addition to or without a present indebtedness, and whether the advances to be made are optional or obligatory, are valid and binding between the parties. They are prior liens, against subsequent purchasers and encumbrances, for all advances made before the execution of the subsequent conveyances or mortgages by the mortgagee, or the docketing of subsequent judgments against him. There is, however, conflict of authority as to whether such mortgages are prior liens for advances made after the execution or recording of a subsequent mortgage or the docketing of a subsequent judgment. *Pomoroy* holds the prevailing rule by weight of authority to be, briefly stated, this: When the mortgage to secure future advances reasonably states the

purpose for which it is given, its record is constructive notice to subsequent purchasers and encumbrances; they are put upon inquiry as to the advances made or liabilities incurred. The record of a subsequent mortgage, conveyance or judgment does not impart constructive notice of its existence to such prior mortgagee. The duly recorded prior mortgage is a lien, therefore, for all advances made before as well as after the record of subsequent mortgages, conveyances or judgments without notice thereof. As the record of a junior encumbrance does not operate as notice to a prior encumbrancer it requires actual notice to effect the lien of a prior encumbrance. The subsequent incumbrancer, by giving actual notice, may prevent further advances to his prejudice, whether the advances are optioned or obligatory. There is another group of decisions to the effect that the lien for future advances arises or is brought into existence only when the advance is actually made. Hence, an advance made after the record of a subsequent mortgage, conveyance or judgment is affected by constructive notice thereof, and its lien postponed to that of the latter. Again, there are cases which distinguish between optional and obligatory advances. If the advance is optional, it must be actually made to create a lien, and an advance made after notice of a second encumbrance loses its priority. And with respect to notice, some decisions hold actual notice necessary; others, that recordation is sufficient as imparting constructive notice. There are yet other decisions that give a prior mortgage to secure future advances absolute priority for all advances made, whether before or after the record of subsequent encumbrances, and without regard to actual notice of the latter; it being the view that the mortgage is effectual as a lien against all persons charged with notice thereof, and the record of it operates as constructive notice. (Pomeroy's Eq. J., 4 Ed., Secs. 1197, 1199.)

Where the time within which a probate must be instituted is not fixed by statute, courts ought not to assume to exercise a power clearly belonging to the legislature, and fix an arbitrary period. In the absence of a limitation fixed by law, an application for administration after the lapse of many years should be closely scrutinized by the court, and it should be well satisfied of the necessity thereof. (Martin v. Robinson, 67 Tex. 368, 3 S. W. 550.) And in the absence of a statutory limitation, to determine whether or not an administration instituted after many years is void, courts should consider not only the time that elapsed, but the entire record of the proceedings, to ascertain the necessity for administration, and whether or not the application therefor was made by those entitled thereto and interested in the estate, and in good faith for the benefit of the estate. (Saul v. Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.)

"Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him." (Pomeroy's Eq. J., 4 Ed., Sec. 1153.)

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M. B. Brewer, secretary of the Godfrey-Brewer Investment Company of Oklahoma City, Oklahoma, has long been active in title men's organizations. His place of business is a resort for title men in his section, and no matter how busy he may be, each and every caller gets a cordial welcome and hospitable consideration. Mr. Brewer's firm specializes in farm mortgages.



## NEWS AND NOTES

The Warren Guaranteed Mortgage Company, of Warren, Ohio, has initiated title insurance in that city, having an approximate population of 40,000, and has met with gratifying success in this new field. Its policies of title insurance include unmarketability of title, as well as defects in, liens or incumbrances upon title, as risks for which indemnity is afforded, and are commendable for simplicity and clarity. As representative of the Metropolitan Life Insurance Company of New York it has loaned \$1,000,000 this year on new residence buildings, each loan covered by a title insurance policy. The company has a fully paid capital of \$1,000,000, and \$50,000 on deposit with the State of Ohio, under the laws of which it is organized. It makes abstracts, issues policies of title insurance, and makes mortgage loans. It has been in active business since April 1, 1918. Owing to increase of business this company has had to enlarge its offices, and has moved from its former quarters to the Victory Building (Warren, Ohio). N. A. Wolcott is president; R. H. Wilkinson, Jr., and L. B. Kennedy are vice-presidents; Wm. L. Coale, treasurer, and Paul E. Kightlinger, attorney and secretary, of this company. Mr. Wolcott is also a director of the Western Reserve National Bank, and president and general manager of the Pacard Electric Company. Mr. Wilkinson, Jr., is president of the Warren Acreage Investment Company; Mr. Coale is president of the People's Savings Company and treasurer of the Sterling Electric Lamp Division of the General Electric Company, and these three last named gentlemen are also members of the directorate of the Warren Guaranteed Mortgage Company, which includes sixteen others prominent in business in Ohio.

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The Bank of Commerce and Trust Company of Memphis, Tennessee, issued the following financial statement on call of the Superintendent of Banks at the close of business, April 28, 1921:

Assets: Loans and discounts, \$14,990,336.79; overdrafts, \$29,238.45; stocks and bonds, \$2,037,441.12; banking house, \$1,251,592.71; other real estate, \$5,287.35; cash and sight exchange, \$3,970,652.46; acceptances, \$14,095.20. Total, \$22,298,644.08.

Liabilities: Capital stock, \$1,500,000.00; surplus, \$1,500,000.00; undivided profits and contingency funds, \$1,058,272.55; bills payable and rediscounts, \$3,202,471.94; deposits, \$15,023,804.20; acceptances, \$14,095.20. Total, \$22,298,644.08.

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A thorough knowledge of the technical phases of the abstract business, an appreciation of practical values, and a keen perception of methods and means to effect results, are essential for efficient management of an abstract business. C. H. Groth, manager and treasurer of Whatcom County Abstract Company of Bellingham, Washington, is demonstrating his possession of these qualifications. Mr. Groth is an energetic member of various organizations in that city.

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Boise Title and Trust Company of Boise, Idaho, conducts an abstract, loan, insurance, bond, estate management, general savings and trust busi-

ness. Its financial condition at the close of business September 6, 1921, was as follows:

**Resources:** Loans and discounts, \$63,648.01; stocks, bonds, warrants, \$62,535.37; abstract plant, insurance plant, safe deposit vault, furniture and fixtures, \$48,408.00; other real estate, \$77,217.44; other assets, \$22,996.35. Total resources, \$274,805.17.

**Liabilities:** Capital stock paid in, \$100,000.00; surplus fund, \$14,000.00; undivided profits, \$8,760.47; savings deposits, \$85,460.24; demand certificates, \$142.00; time certificates of deposit, \$9,786.08; trust deposits, \$38,656.38; bills payable, \$18,000.00. Total, \$274,805.17.

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It is a well-known fact that an organization becomes imbued with the spirit and character of the man or men who run it. When his or their control is extended through some length of time the organization assumes and typifies the character, spirit and ability of that man or group of men. The policy and attitude of the Chicago Title and Trust Company commends Harrison B. Riley, its president, as one of the ablest executives in the title business; a man with breadth and vision, keenly interested in every detail of his business, alert, energetic, an indefatigable worker. No one can talk with his associate executives without noticing the spontaneous expressions of their regard and esteem for him that escape their lips, which is a big tribute to his ability. The company of which Mr. Riley is the head is the only abstract and title organization in Chicago. Under Mr. Riley's leadership, however, the company's policy and attitude is not one of might by reason of the fact that it has no competitors, but one of right—the right of the public to service that is useful, prompt, efficient, and rendered with courtesy. The company is a generous supporter of whatever gives fair promise of increasing the usefulness and improving the status of the title business, not only locally, but nationally.

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W. H. Winfree, president of Northwestern Title Insurance Company of Spokane, Washington, operates that company under a most excellent system. Legal problems are carefully analyzed and briefed, and their solution, therefore, not founded upon an individual's dictum. The action of the company with regard to a problem, being founded upon principle and authority, is accorded respect. Mr. Winfree, himself, is an able lawyer. He is a member of the Legislature of his state.

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The Home Abstract Company, Fort Worth, Texas, of which Lewis D Fox is president, follows the commendable policy of maintaining a surplus fund, thereby having an available reserve for exigencies. The company has a capital of \$20,000.00, and a surplus of like amount.

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Before one may conduct an abstract business a bond must be furnished in the following states: Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Utah and Idaho. (The various statutes were analyzed and reviewed in the January-February, 1920, issue of "Lawyer and Banker.") There are no regulations anywhere as to personal qualifications.

# TRANSACTIONS BY TELEPHONE

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By Robert Gallagher of the Boston, Massachusetts Bar.

The telephone is a great convenience, but the law does not regard it as adapted to all occasions. Personal attendance, or face-to-face interviews, are still necessary to validate certain legal acts or demands.

Where the personal presence of a party before an officer is a requirement of the statute, an acknowledgment made by a person not in the presence of the officer, by means of the telephone, was held void in the Idaho case of *Myers v. Eby*, 193 *Pac.* 77, annotated in 12 *A. L. R.* 535. This decision is sustained by the majority of the few cases which have passed upon the question.

Oaths taken over the telephone are likewise held to be invalid. In *Carnes v. Carnes*, 138 *Ga.* 1, 74 *S. E.* 785, the verification of a petition for alimony and for a writ of *ne exeat* was regular on its face, but it was shown that it had been sworn to over the telephone, if at all, and that the notary signed it without ever seeing the plaintiff about the matter. The court said: "In order to make an affidavit, there must be present the officer, the affiant, and the paper, and there must be something done which amounts to the administration of an oath. There must be some solemnity, not mere telephone talk. Long-distance swearing is not permissible. Telephonic affidavits are unknown to the law. A moment's thought will show a sound reason for this. An officer hears a voice coming through the receiver of a telephone. For identification he must rely on recognition of the voice (if he knows it), and the statement of the person as to who he or she is. Reference is made to some paper, more or less fully described. Later, a third person presents to the notary a paper as being the one sworn to. How does the notary know, except by hearsay, that the paper presented is the identical paper mentioned? If this is an oath, when is it taken—when the telephone message is sent, or when the paper is later presented by the third person? Where is it taken—at the place where the affiant is, or that where the officer is? Suppose they should be in different counties, where would be the jurisdiction of a prosecution for perjury, if the oath were untrue? It will be seen that great confusion might easily arise from such a system."

In *Re Napolis*, 169 *App. Div.* 469, 155 *N. Y. Supp.* 416, an attorney was severely censured for taking an affidavit over the telephone. The court said: "Of course, such a method of administering an oath is entirely illegal and unauthorized, and respondent, in acting as he did, was guilty of a misdemeanor. \* \* \* The offense is a serious

one and receives the severe condemnation of the court. \* \* \*The court again wishes to express its condemnation of the acts of notaries in taking acknowledgements or affidavits without the presence of the party whose acknowledgment is taken, or the affiant, and that it will treat as serious professional misconduct the act of any notary thus violating his official duty." The question of the validity or effect of the affidavit itself was not involved in this case.

A demand by telephone of the maker, for the payment of a note which was payable at the maker's residence, was held in *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, *Ann. Cas.* 1912A, 861, 34 L. R. A. (N. S.) 417, not to be a sufficient presentment to charge an indorser thereon, although the one making the demand had the instrument in his possession at the time the demand was made.

In the absence of a statute requiring a written acceptance of a check, an oral acceptance is good (5 R. C. L. 517) where the drawee has funds of the drawer in his hands (5 R. C. L. 518). In accordance with this general rule an acceptance in a telephonic conversation has been sustained. The Negotiable Instruments Law, however, requires an acceptance to be in writing. Under this provision, a telephonic conversation has been held insufficient as an acceptance. *See* 2 A. L. R. 1146.

Communications made by telephone stand in general on the same footing as those made face to face, provided the identity of the person sought to be charged is shown. 1 R. C. L. 477. Thus, one telephoning an order to a store for goods in the name of a credit customer, to get them without paying for them, is held guilty of larceny by false pretenses in *State v. Peterson*, 109 Wash. 25, 186 Pac. 264, 8 A. L. R. 652.

By the weight of authority, evidence is admissible as to conversations over the telephone, where the witness has called for a designated person at his place of business, and the one answering the telephone and carrying on the conversation claims to be the person called for. This rule is based upon the apparent necessity, in view of the constant use of telephones, of holding that where a telephone conversation is carried on in the ordinary and usual manner, and is had in the usual way, evidence of the conversation must be admissible; the weight to be attached thereto to be a matter for the consideration of the jury, in view of all the surrounding circumstances, including the admissions or denials of the other party to the conversation. *See* L. R. A. 1918D, 720.

A while ago a New York paper called attention to a modern abuse of the telephone by stock salesmen, and others, who use it in an attempt to make sales. This custom, states the paper quoted, "raises an interesting question of personal rights. Has a telephone subscriber

any defense of privacy, which people who do not have his acquaintance are bound to respect? Is it anybody's privilege to call up anybody else in the city on the telephone, and beg for a charity, or expatiate on the merits of a particular make of automobile or a particular issue of bonds?

"The increasing reliance on this form of personal appeal, whether or not it may be called a nuisance and an abuse of telephone service, has reached a point where, at least, it may be characterized as an abuse of courtesy and a violation of the ethics of ordinary life. Salesmen and solicitors who would hesitate to invade a citizen's home in person show no scruple about invading it by the proxy of a telephone call.

"Perhaps the practice had an excuse during the war, when the necessity of obtaining subscriptions for Liberty bonds and relief funds gave it some justification. But it is since the war that it has attained its worst development."

This annoyance does not seem to require a legal remedy. If those approached in this way by unknown salesmen for trade purposes would flatly refuse to do business with them by telephone, the evil would soon cure itself.

# SOUTHERN STORIES

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## IMPORTANT TO BE THERE.

A famous author was present one Sunday morning at the services on a battle cruiser at New Orleans. He noticed that it was well attended.

"Are you obliged to attend?" he asked one of the sailors.

"Not exactly obliged," was the answer, "but our grog would be stopped if we didn't."

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## BUSINESS METHODS.

When the agent brought Mrs. Busch her fire insurance policy he remarked that it would be well for her to make her first payment at once.

"How much will it be?" she asked.

"About \$100. Wait a minute and I'll find the exact amount."

"Oh, how tiresome!" she exclaimed. "Tell the company to let it stand and deduct it from what they will owe me when the house burns down."

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## HONEST FOR ONCE.

"Can I get off to-day?" asked the office boy.

"Somebody dead in your family, I suppose," rejoined the sarcastic employer.

"No sir, not dead, but dying."

"Dying, who?"

"I am, sir—dying to see a ball game."

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## KNEW WHAT THE WANTED.

Colonel "Bob" Miller the noted criminal lawyer of Mississippi tells the following story anent the effect of the Eighteenth Amendment?

"I am reminded of a little story of a colored preacher who went after some wine for sacramental purposes. The dispenser or whoever it was from whom he was getting the permission said 'Parson, which would you prefer Bourbon or Rye' and he said 'The Congregation have done voted for Gin.'"

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## WANTED TO BE SURE.

New Orleans Sentry to Vermont Private—"Halt, who goes there?"

"Private Stock, Company C."

"Advance, Private Stock, and be sampled."

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## JUST STROPPING HIMSELF.

When the train stopped at the little Southern station the tourist from the North sauntered out and gazed curiously at a lean animal with scraggy bristles, which was rubbing itself against a scrub oak.

"What do you call that," he asked of a negro.

"Razorback hawg, suh."

"What is he doing rubbing himself against that tree?"

"He's stropping himself, suh, es stropping himself."

# EXPERT EXAMINATION OF INK MARKS ON PAPER

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By Marshall D. Ewell, M. D., L. L., D., of Memphis, Tennessee.

The chemical treatment of ink on paper, under the rule usually applied by courts, that no application of chemicals may be made which will deface or injure the document in question at times presents great difficulty. As a rule the necessary reagents can be successfully applied to some unimportant part of the writing, the reaction observed, and the chemical quickly neutralized, so that not only will no damage be done to the document, but it will require close inspection to determine where the application was made.

In several cases we have been required to determine or restore an underlying writing which has been apparently erased by writing another word or figure over it, by drawing numerous ink marks across it, or otherwise covering it with ink sometimes of a different kind from the underlying one. The desired result can sometimes be accomplished by dissolving off the ink last applied and thus leaving the underlying writing apparent. Often, however, even when the greatest care is observed, both writings will be simultaneously removed, in which case if the underlying writing cannot be restored, as is sometimes possible, the object sought is defeated.

The identification of ordinary writing ink on paper usually presents no great difficulty, and the necessary tests can be made as above stated, without impairing the instrument in the least degree.

When, however, the paper itself contains a constituent that gives the same color reactions as those of some of the common inks, the difficulty is greatly increased. In our experience it is not uncommon to find copper or iron in the substance of the paper upon which legal or other documents are written, in amounts sufficient to react to the chemical reagents usually applied.

In such cases a different reagent must be used, or some manipulation resorted to, in order to recognize the reaction of the ink as distinguished from that of the paper, which can usually be done.

Sometime since we were called upon to determine the kind of ink with which writing had been executed upon a bright scarlet paper. The application of a minute drop of the reagent usually applied to ink on white paper disclosed the fact that it stained the paper a dense black, thus obscuring the reaction. It was not permitted to scrape the ink from the paper and thus separate it therefrom, if indeed that were possible on a paper so slightly polished and so porous as the one in question.

We finally succeeded after several trials, by the application of a minute drop of the reagent to thick portions of the ink lines, in identifying the ink as a nut-gall iron ink.

The identification of ink on blue paper, especially where the surplus ink has been removed by a blotter, sometimes presents a similar difficulty, though not so great as in the case first mentioned.

Every case presents its own special facts, and these instances are cited to show the inherent difficulties of such problems. To go at length into the technique of this subject would not be practicable within the limits of this article. The *modus operandi* in every case must depend upon its own particular facts.

Of course, it is the duty of the court to preserve from injury or destruction the document in question before it. In one or two instances we have seen important documents, a contested will in one case, practically destroyed by the careless use of corrosive chemicals by one claiming to be an expert. There need, as a rule, be no damage to the documents by any proper application of a reagent. In one important case, however (the McCaffrey Case, Cook County, Ill.) the court, with the consent of counsel permitted portions of the document containing written words as well as printed, to be cut out and so treated as to destroy their identity. This of course, could not have been done without the consent of counsel. The case referred to was a *nisi prius* case, and is not reported. As a necessary precaution before anyone claiming to be an expert in this department of learning is allowed to make any application of a chemical reagent to a document in a litigated case, his practical as distinguished from merely theoretical qualifications should be carefully inquired into by a proper direct and cross-examination. The ease with which uninstructed counsel are imposed upon by self-alleged experts is astounding. In my experience the most learned and best qualified lawyers are the ones who are most open to suggestions as to the proper presentation of expert testimony and the cross-examination of experts, and the well-qualified expert should be able to instruct counsel when necessary in the performance of these duties; for in the practice of most lawyers handwriting and ink cases are quite uncommon. Many of the evils attending the use of expert testimony would be remedied if courts and counsel were more careful in their examination into the qualifications of those claiming to possess expert knowledge. No person should be tendered to the court and jury by counsel as an expert witness until the counsel employing him are fully satisfied as to his qualifications. Were the qualifications of a person claiming to be an expert more carefully inquired into by counsel before offering him as a witness, such a case as *Broquet v. Tripp*, 36 Kan. 700, 14 Pac. 227, would be impossible. This case, though not relating to handwriting or inks, is instructive. A man named Witt was offered as an expert, and testified that a disease of sheep called the "scab" was caused by an insect, and that he had often seen it through the telescope, which statement he corrected by stating he had often looked at it through the telephone.

No one claiming to be an expert should, as is often done, be asked on his preliminary examination if he is an expert. This is a question for the court upon the facts presented, not one of opinion for the witness, and opposing counsel should have an opportunity to cross-examine and to offer evidence as to the qualifications of the witness before he is permitted to testify. See *Lawson, Expert Testimony*, 2d ed. p. 277.

We have heard witnesses testify as experts as to the age of ink on paper who could not tell the different kinds of ink in common use, nor



make the simplest test by which to identify any ink; and too often opposing counsel do not possess nor attempt to acquire the knowledge necessary to expose such ignorance.

Too often, also, courts, especially those presided over by old men in country districts where these questions seldom arise, interpose unreasonable and sometimes unsurmountable obstacles in the way of such tests, not infrequently to the defeat of justice. There is such a thing as being too conservative in this respect. Tests of this sort made by competent persons are often the means of defeating fraud and establishing justice, and should be encouraged rather than discouraged.

One of the most frequent questions propounded to an expert is as to the age of a specimen of handwriting. Sometimes this question can be satisfactorily answered within a reasonable time limit, especially in the case of nut-gall iron inks; but more frequently it is incapable of even an approximate solution. The questions may be complicated by an attempt fraudulently to age the writing artificially; but this can usually be detected by the lack of harmony between the different elements of the case. Long experience is the only safe guide in such cases. To look at the writing in question through a microscope and claim thereby to determine the kind and the age of the ink without a chemical test and without comparison with authentic specimens (as I have not infrequently seen done) is mere charlatantry.

The determination of the sequence of crossed ink lines is another question often propounded to the expert, the solution of which is often full of fallacies. The longer the experience, the more conservative should the expert become in this and the preceding case; for in too many cases the real sequence cannot be determined.

The choice of an ink for legal and general commercial use is a matter of great importance and one that often receives little consideration. We were called some years since as an expert witness in a case to which a national bank was a party, in which the books of the bank were written with a so-called "anti-rust black ink" which indeed had some merit in not rusting the pens, but which could be wiped off the written page with a damp cloth or sponge.

There is no ink (except carbon inks which are very inconvenient in use) which cannot be removed by appropriate chemical treatment; but there are inks which are convenient in use, give a good black color after the lapse of a short time, and are practically indestructible by lapse of time or any agency likely to be used which will not leave evidence of the fraud upon the paper. The basis of these inks is iron; and they are known as nut-gall iron inks. I have examples of writing executed with this kind of ink which are several hundred years old and are still in excellent condition.

After the lapse of a short time, this sort of ink forms a chemical union with the constituents of the paper, and though capable of being removed by chemicals, enough of the iron will usually be left in the paper to enable the writing to be restored to legibility by appropriate treatment.

All the so-called blue-black writing fluids on the market are nut-gall iron inks, with some coal-tar dye to give a provisional color to the ink when first applied to the paper, and in a short time become permanently black, changing, however, after the lapse of many years to a more or less yellowish black, due to the oxidation of the iron. No other sort of ink should be used for legal or general commercial purposes, as such other inks will, as a rule, either fade with the lapse of time or may be removed from the paper as above described.

Writing fluids manufactured by Carter, Sanford and other reputable makers, fulfil all the necessary conditions of permanence and are entirely suitable for general, legal, and commercial use.

# Comment Of Interest

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**From Former Governor Augustus E. Wilson of Louisville, Kentucky:**

"I believe he (Ansell) did his duty as a lawyer, a soldier, and a gentleman, who had served his country faithfully as a soldier, and I am sure that the finding that Bergdoll escaped justice through his connivance was a great wrong and injustice to an honorable soldier, gentleman and Acting Judge Advocate General.

"I believe that his fight against great obstacles, for justice to the enlisted soldier and against abuses of the courts martial system is one of honor, courage, and justly styled the record of a hero and a patriot."

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**From J. Milton Kenyon, leading Washington, D. C. Lawyer:**

"The editorial in the October, 1921, issue of "Lawyer and Banker" entitled "Samuel T. Ansell, Soldier, Lawyer and Patriot" is a just resume of Brigadier-General Ansell's connection with the Bergdoll case. It epitomizes his great and lasting achievement on behalf of the private soldier.

"The excerpts quoted therein show that it is now and always has been the rule that any one, no matter how vicious, is entitled to the service of a lawyer. Even the miserable wretch who in cold blood murdered the beloved President McKinley had counsel assigned for his defense.

"Representative Johnson's majority report censured General Ansell's firm, in part, for believing Bergdoll's story of hidden gold, yet he and his fellow members of the committee had no difficulty in believing Mrs. Bergdoll's story of hidden gold and actually recommended that the hiding place be discovered and the gold confiscated. Were Ansell and Bailey to be censured for believing a story similar to the one which Mr. Johnson accepts as a fact and recommends that machinery of the government revolve about it?"

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From LONDON, ENGLAND. "The Lawyer and Banker (U. S. A.) is unique in its feature articles. A valuable publication for any lawyer's table. It is unusual in that it is the only individually owned law and title magazine in America. We commend it for its sterling independence and daring treatment of legal uses and abuses."

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Law Times.

From INDIANAPOLIS, INDIANA. "Good enough for any one. Yours is a publication devoid of cant or hypocrisy. One gets sleepy reading the ordinary law magazine. A perusal of The Lawyer and Banker discloses valuable matter interestingly treated on unusual subjects. Your recent defense of General Samuel T. Ansell was admirable."

Thos. R. Marshall.

# THE Lawyer and Banker

AND

## SOUTHERN BENCH AND BAR REVIEW

CHARLES E. GEORGE, Editor  
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### *ITA LEX SCRIPTA EST*

*Common sense does not ask an impossible chessboard, but takes the one before it and plays the game.*

Jurors have been bitterly criticized by Judges of the criminal courts in Detroit, New York and St. Louis as being possessed of a Bolshevistic spirit due to the varied and complex conditions of present-day civilization—a lack of appreciation of ideals and standards of good citizenship.

It is charged that jurors are unmindful of their oaths by reason of a spirit of lawlessness abroad to which prohibition is a contributing factor. Judge Alfred J. Talley of the Supreme Court of New York recently said:—

“Practically every man called for jury duty nowadays is willing to violate the prohibition law and he knows all his friends are willing to do the same thing. That in itself is the breaking down in one spot, at least, of the respect for the law which every citizen should have. Once that respect for the law is shattered a break-down all along the line is not extraordinary. It is exactly like a break in a wire conducting electricity—although the air is charged with electricity and power houses are working overtime, one break in the wire and connection is destroyed.”

This may be true but we opine that pro rata there is as great a respect for the Volstead Act and its enforcement among the citizenry as there is among the judges. The writer knows of several members of the bench who profess prohibition by word of mouth but whose cellars are well stocked with *spirits frumenti*. Preaching the doctrine of absolutism and prohibition in churches and schools

but loading up to the gunwale with connival spirits when opportunity offers—in seclusion. To our mind the Judge who expresses dissatisfaction with the verdicts of twelve jurors is indiscrete to say the least, and guilty of a gross usurpation of power.

One judge went so far as to rebuke the jury for bringing in a verdict which he thought was not in accordance with the facts that were brought out at the trial and he announced that he would have the juror's names stricken from the roll so that they could never serve again.

The war has resulted in letting down many of the barriers against wrong-doing, but when judges set an example in violating the law, the result is likely to be disastrous. Jurors sometimes err, so do judges both are human.

In a criminal trial the judge has the sole power to pass upon questions of law and evidence, and the jury has the sole power to pass upon the facts. The line between these two powers is clearly defined by the Constitution, the statutes and the common law.

Judges are no more infallible than jurors. The record of reversals of their rulings by higher courts might, almost, lead a careless observer to the conclusion that most judges are wrong in their decisions. At any rate, they have enough to keep them busy in the province assigned to them by the builders of our Government without trespassing upon the province of the jury.

If a jury listens to the evidence of a witness—be that witness a policeman, a physician, a technical expert, or who he may—and choose to disregard that evidence, the judge has no more right to express his disapproval than the jury should have to express their disapproval of his rulings on points of law. Less right, as a matter of decency, because the judge can punish the jury for contempt of court while the jury cannot punish him for contempt of its rights.

*No Judge has a right to censure or reprimand a jury for exercising the functions assigned to them by the Constitution, the Statutes and the Common Law.*

Of course, if the question of corruption or undue influence arises, the findings of a jury cannot stand. But, in that event, the judge has it in his power to bring the offending jurors to swift account.

Judges have often had stupid or stubborn juries inflicted upon them. And, being human, they have shuddered and writhed when stupid verdicts were rendered.

Occasionally, too, intelligent jurymen have heard judges make

rulings and decisions which they know to be wrong, and which were ultimately reversed.

But it is not a matter of human emotions. It is a matter of law and of people's rights. These rights were only obtained by the common people after centuries of struggle. To trespass upon them is more dangerous to free government than the occasional acquittal of a malefactor or even the hurting of a sensitive judge's feelings.

It is essentially the province of the court to pass on questions of, and to determine what is the law. It is alone the province of jurors to determine the facts in the cases submitted to them under the law as applied by the Court.

When a Judge on the bench undertakes to criticize a jury for its determination of facts, that court goes out of his realm and transcends his duty. He becomes a bludgeon hammering the unprotected head of justice. He is usurping a power he does not constitutionally possess. He becomes a Czar battering down the citadel of right. A menace to freedom and good government. Such action is a wilful and unlawful abuse of the authority of judicial office which we must all regret and deplore. The independent action of a jury free from the cuddling influences of the bench challenges our highest respect and admiration and brings a priceless sense of confidence and security in the ultimate of our governmental institutions. To hold otherwise would be an abuse of the processes of law, which are designed to defend the innocent and to protect society against the wrongs of the criminal. Dishonesty, corruption and viciousness are not confined to the citizenship. Judges are not above the law. Justice measured, reasoned, unprejudiced, unwavering and unchangeable may be as surely found among the poor and lowly as among the rich who have been granted a little brief authority.

The passing cloud serves but to emphasize the glory of the light.

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### EDITORIAL COMMENT

The English statute books in common with our own, are filled with bad and unpopular laws that would and should have been long ago repealed, excepting for the curious conservatism that has strangely survived. There is one law in particular, passed in 1772, by Parliament, expressing the feelings, prejudices, passions and wishes of the Monarch then, that now is looked upon with disfavor and considered as hateful—a one man law—whose origin was in the sole initiative of George III., a sovereign who did more during his reign to weaken respect for England than all others who have since preceded him. The Royal Marriage Act was forced through a venal and reluctant Parliament by the personal will of the Sovereign.

This measure made the consent of the Sovereign a necessary condition for the validity of the marriage contracted by a descendant of George III. *during the term of his or her natural life* excepting only when above the age of 25 years, a member of the Royal family shall give twelve months previous notice to the Privy Council of their intention. Even then such union will be void if both Houses of Parliament should signify their disapprobation. The statute in question by imposing restraints on freedom of choice in marriage in the case of the Heir Apparent to the Throne and other members of the Royal Family, from which the very humblest of the subjects of the Crown in the British Empire is free, is a wanton violation of the liberty of the individual, subversive of the principle of equal rights for all, aimed to secure the establishment of a royal caste system borrowed from the German Courts and repellant to the genius of the people of the British Empire, who desire their Royal Family to be closely associated and identified with them by community of wants and wishes, of sentiment and of blood.

The bill had no excuse save to *prevent* the marriage of a Prince or Princess without the approbation of the Reigning Power. The bill further made the issue of all such marriages illegitimate and stamped the wife as a "mistress" the license and ceremony being "null and void" to all intents and purposes. The Act further provides that "any person solemnizing or assisting, or being present at, the celebration of such prohibited marriages shall incur the penalties of *præmunire*." The passage of the Act caused the Royal family to be treated as a caste and has ever been a slur on the English people. It was not the purpose to prevent the King's family from forming disreputable connections but to limit their choice to the class of Royalty and confine them to one circle.

Among those who have suffered by the Act in question can be found the Duke of Sussex in 1773, the Duke of Cumberland, the Duke of Gloucester. The King's own sister, the Queen of Denmark, saw her lover Struensee, horribly executed that a lesson might be taught against marriages of convenience and establishing marriages of preference. Since the passage of this bill to the present, it has been denounced as absurd, monstrous and detestable.

Sir John Scott (Lord Chancellor Eldon) Horace Walpole, Charles J. Fox, Lord North, Sir James Mackintosh, Colonel Barre, Lord Shelburne, Lord Chatham, Lord Chancellor Camden and Edmund Burke, violently opposed the law. All history is filled with regrets that the right of the individual were annihilated at the demand of Royalty. Lord Chatham declared the law "impudent". He said further: "We consider the right of conferring a discretionary power prohibiting all marriage to be above the reach of any legislator as contrary to the original inherent rights of human nature, which, as they are not derived from, nor held under, civil laws, by no civil laws can be taken away. We freely allow that the legislator has the right of prescribing rules to marriage as well as to every other species of contract, but there is an essential and eternal difference between regulating the mode in which a right may be enjoyed and establishing a principle which may tend entirely to annihilate that right. To disable a man during his whole lifetime from contracting marriage, or, what is tantamount, to make his power of contracting such marriage dependent neither on his choice nor upon any fixed rule of law but on the arbitrary will of any man or set of men, is ex-

ceeding the power permitted by the Divine Providence to human legislators. It is directly against the earliest command given by God to mankind, and contrary to the right of domestic society and comfort."

The unbridled intellect of England has all along opposed the Act and its operation. Attempts to repeal this law have been unsuccessful, efforts to secure its modification have awakened the sympathy and affection of the people at large but the measure created a prerogative and the power could not be changed or dealt with by Parliament without the assent of the Crown first had and obtained, through its responsible Ministers.

To Americans it seems strange that a power conferred by statute or the Congress cannot be altered by the same power that created it. The absolute rule of the Sovereign seems to us a violation of all sound principles of legislation as well as of human or Divine law. The laws of a dozen or more generations back may not be suited to present day affairs.

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Lawyers should show moral courage by expressing openly their views on judicial misconduct. If it be true that the proper administration of justice in this country demands that the personal and official conduct of Judges be governed by recognized and settled standards of propriety, it is surely timely and proper that the members of the bar display moral courage sufficient to express openly the views which they hold and often express quite freely when out of court concerning judicial misconduct. It frequently occurs that in the particular case the offense does not rise to the grade of an impeachable or indictable crime. It is obvious that a Judge may often be entirely unfit to administer justice, although under the law, he cannot be impeached.

If I were asked how best to interpret the relation of justice to the judicial office, I should think it advantageous to formulate canons of ethics for Judges. Such a task would lead me first to the Scriptures as being the best source of jurisprudence, which, to quote the maxim of civil law, is the knowledge of things divine and human, the science of what is right and wrong.

If any further specifications were demanded, I would emphasize the need of moral courage in a Judge as the next greatest requisite, and would cite the glorious example of Lord Coke, who forfeited the office of Chief Justice of England and spent seven months in the Tower because he protested against the aggressions of James I.

Judges should not be overborne by the rank or reputation of the counsel engaged nor affected by the wealth, position or influence of the parties. They should be independent and unafraid. Judges should not try to make popular decisions. A Judge who strives to gain popularity by his decisions, without regard to the right of the cause, renders himself unfit to deal out even-handed justice, and his act is prompted by deceitful, selfish or unworthy motives.

Judges should not take an active part in political campaigns, either by appearing on the platform for public discussion of partisan issues or by publishing their political sentiments for the benefit of candidates or in aid of a political faction or party. Any breach of observance of this rule instantly lowers the Judge, if not the court of which he is a member, in the respect of thinking men and women. Judges are not chosen by reason of a public desire to place politicians on the bench, but in order that justice may be impartially administered.



A valued subscriber in New York City calls attention to the fact that a provision of the Tax Act of 1921, prohibits income taxpayers from unnecessary examination of books of account. The Revenue act of 1921 makes some new provisions covering the examination of income taxpayers' books to check up on returns. One of these provisions is that no taxpayer shall be subject to unnecessary examinations and that only one inspection of the taxpayers' books of accounts shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner of Internal Revenue, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

The new act authorizes the Commissioner and his assistants, whose duty it is to see that the law is properly complied with, to examine all books, papers and memoranda bearing upon an income tax return and to examine under oath persons having information in the premises. The act provides that in the absence of fraud or miscalculation the decision of the Commissioner on any claim presented under or authorized by internal revenue laws shall not be subject to review by any other administrative officer, employee or agent of the United States.

"Except upon a showing of fraud or malfeasance, an agreement in writing between the taxpayer and the Commissioner as to the amount of taxes due is final and conclusive, and therefore binding upon both parties," says the bureau of Internal Revenue.

"The act provides that no suit or proceedings for the recovery of any tax or penalty alleged to have been erroneously or illegally assessed or collected, shall be begun before six months from the date of filing (unless the Commissioner renders a decision thereon within that time) nor after the expiration of five years from the date of payment of such tax or penalty.

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The tendency of the Federal Government to build up a bureaucracy to supervise State activities under the guise of Federal aid has been severely condemned by prominent jurists in discussing a bill pending "to promote the welfare and hygiene of maternity and infancy" as a violation of the United States Constitution. It is said that the Constitution specifically defined the things Congress might "provide for the common defense and general welfare," and that none of these included the practice of medicine or midwifery. It is declared that Congress might seek to control education under the guise of aiding it and gradually extend Federal supervision over every State activity and destroy local initiative, self-reliance and capacity for self-government.

With the power to collect three-fourths of the Federal revenue from ten States, as is now done, it requires no imagination to foresee the riot of extravagance into which the Federal Government will be plunged if Congress has the power to appropriate the public money for whatever it considers to be in the public interest.

Our system of government is built upon the bedrock of local self-government. Whatever impairs the energy, the initiative, the effectiveness, if you please, of State and local government of purely State and local affairs tends to destroy the capacity of our people for self-govern-

ment structure—a discovery appears to have been made by congress of a new and hitherto undreamed of power to legislate on any subject which it deems to involve the general welfare, and under that interpretation it has recently passed the so-called Sheppard-Towner law 'to promote the welfare and hygiene of maternity and infancy.' Under that law the Health Departments of every State may be brought under the supervision of a Federal Department of Health.

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### THE LAST OF THE SERJEANTS-AT-LAW

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Lord Lindley, the last member of the English Bar to bear the style of a Serjeant-at-Law, has died in England at the age of 93.

The Serjeants-at-Law were an order of great antiquity, not abolished until 1880. It is traceable from the French "freres-serjens", and Serjeants' Inn is said to have been originally the abode of the servitors to the Knights Templars hard by. "Serjeant," at any rate, is a form of "serviens". The term is found in use as early as the thirteenth century, and one of the characters in the "Canterbury Tales" is

A serjeant of the law, wary and wise.  
That often had y-been at the parvis.

The "parvis" was the porch of Old St. Paul's where each serjeant had his particular pillar, at which he was interviewed by his clients.

Serjeants were created by writ of summons under the Great Seal, and originally wore a *coff* (a white skull cap), and afterwards a round piece of black silk on the top of the wig. They took special precedence after Knights Bachelors.

Until 1845 serjeants had the exclusive right to lead in cases in the Court of Common Pleas. Judges of the superior Courts of Common Law were always serjeants (and consequently addressed serjeants pleading before them as "Brother") down till the Judicature Act of 1873.

The Society of Serjeants' Inn was dissolved and its property distributed among the members in 1877.

# EVIDENCE OF SIMILAR FACTS

By F. L. Stow, LL. D., of the English Bar.

The effect to be allowed to evidence of similar facts should be made clear and certain by the law being formulated in an authoritative statement. An attempt to construct such a statement will be found to be instructive as suggesting not only some of the uses of legislation when applied to the law of evidence, but also some of its limitations.

One of the distinctive features of the English law of evidence is the jealousy with which it protects an accused person from being harassed and prejudiced by questions regarding other offences committed or alleged to have been committed by him. If he will only keep discreetly reticent regarding his character the prosecution must, in general, observe a similar silence.

This consideration for the accused is, I believe in striking contrast with the course followed in most European countries. There the past is raked up, and the defense of an accused person, even if innocent, must be a Herculean task if his past career is not free from blemish.

The common law rejects such evidence not because it is irrelevant (for logically it is relevant), but because an undue weight is allowed to it and it is misleading. Give a dog a bad name and hang him. Place a man's bad record before the jury, and it is almost impossible for them to take an impartial view of a case brought against him. Slight evidence becomes magnified. Every evidence is liable to appear suspicious. Instead of approaching the case with a presumption of innocence, the jury starts with a presumption of guilt, which the accused man has to displace; and he is lucky if his efforts to do so are not regarded as more or less ingenious attempts to wriggle out of a manifestly well-founded charge.

In some cases, however, to confine the evidence to the act charged would be to present a false picture to the jury. Where the act is one of a series of similar acts it may often happen that to give evidence of the one act only and exclude all evidence of the others will create and altogether misleading impression.

In the leading case on the subject, *Makin v. Att.-Gen. for New South Wales* (1894) A. C. at p. 65, the law is enunciated in the following well-known passage:—

'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of lead-

ing to the conclusion that the accused is a person likely from his criminal conduct and character to have committed the offense for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would be otherwise open to the accused.'

'This statement is very wide in its terms and would seem to recognize that such evidence is admissible if it is relevant (otherwise than by showing bad character) to any issue before the jury—that it could, in fact be admitted in proof either of the commission of an act or of the intention with which an act was committed. This view is borne out by details of the case, and I submit that few will be disposed to disagree with the view of the decision expressed by Scrutton J. in *R. v. Ball* (case incest) (1911) A. C. at p. 52, in the following terms:—

'I only wish, further, to say that as I understand *Makin v. Att.-Gen. for New South Wales* it does not involve very much the same principle. In that case the prisoner was being tried for the murder of a child, and what was proved was that he had received the child from the mother for a very small sum and that its skeleton was found in the back garden. Now these facts in themselves are consistent with death by an ordinary disease and irregular burial, or they are consistent with murder to get rid of the child and to take advantage of the sum received for its maintenance. It was proposed to tender evidence that a number of other skeletons had been found in the back garden of a previous residence of the prisoners, and that a number of other children had been entrusted to the prisoner also for inadequate sums, and that all those children had disappeared. I do not think that the evidence was given to show intent, because the first thing to show was, not intent, but that the prisoners had done the act at all—that they had actually killed the child; it was not till they had killed the child that the question of the intent with which they did it arose, and I think that that evidence must have been given to enable the jury to draw the proper inference as to the sort of business or transaction that the prisoners were carrying on, of which the disappearance of this particular child was an incident. From proving the sort of business carried on to proving the relation of the parties seems to me a very small step.'

The Court of Criminal Appeal, however, took a different view, for they said, on p. 57 of the report:—

'Evidence that a similar act was committed before is not evidence of the commission of the act on the day charged. Such evidence can only be receivable to show the *mens rea* in the doing of such act. If on the facts of this case an act of intercourse was proved no question could arise as to the *mens rea* with which the act was done, for the statute forbids the act as in itself criminal. If without the admission of the disputed evidence the fact of the two accused persons occupying the same bed on the date or dates charged was insufficient proof that intercourse took place between them on that date or those dates, then the fact that intercourse took place between them on former occasions could only be tendered to show that they were persons likely to have intercourse on the the particular dates—a ground on which evidence is not receivable. It would be tendering evidence of the former commission of similar acts, not to show the *mens rea* with which the act was committed, but to show the commission of the act itself. We are of opinion that such evidence is not receivable.'

This view was disposed of in the House of Lords in the following words:

'The law on this subject is stated in the judgment of Lord Chancellor Herschell in *Makin v. Att.-Gen. for New South Wales*; it is well known and I need not repeat it—the question is only one of applying it. In accordance with the law laid down in that case and which is daily applied in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed—not to prove the *mens rea* Darling J. considered, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in bed of the fact that when there they had guilty relations with each other.'

The view of the Court of Criminal Appeal is certainly not the view at which the ordinary mortal would arrive by the use of his logical faculties; but it agrees with the view expressed in general terms in the leading text-books. Stephen confines the effect of such evidence to proving intention or a state of mind (Articles 11 and 12 of 'Digest'). Phipson imposes a similar limitation on the use of such evidence, and will not allow that it is receivable to prove the commission of an act.

The views which are expressed in the text-books are in harmony with those enunciated in the cases, for, strangely enough, even in those cases in which such evidence is obviously used in proof of the commission of an act by the accused, it is not avowedly so used. Thus, in *R. v. Geering* (1849) 18 L. J. M. C. 215 the effect of the evidence was plainly to show that the prisoner administered the poison by means of which the deceased's death was alleged to have been caused; but the evidence was ostensibly admitted merely on the general and abstract question whether the death was due to accident or design, and not on the particular and personal question whether poison had been wilfully administered by the prisoner.

'The domestic history of the family,' said Pollock C. B., 'during the period that the four deaths occurred is also receivable as evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not.'

In the New Zealand case of *R. v. Hall* (1887) 5 N. Z. L. R. 105, the comment on *R. v. Geering* is as follows:—

'The fact that the evidence tended to prove, and no doubt was meant to prove, administration of arsenic by the prisoner (which otherwise was not made out), is ignored. This is most unsatisfactory. We feel compelled to say that the case cannot be regarded as authoritatively establishing a doctrine which appears to be disavowed by both Bench and Bar.'

*R. v. Flanigan*, 15 Cox C. C. 403, is a striking illustration of the admission of such evidence for a purpose which is disavowed. In

deciding to admit the evidence, Butt J. said: 'It has been decided in some cases—in one case, at least, on very high authority—in *R. v. Geering*, in the case of poisoning by arsenic—that evidence of the deaths of people other than the deceased, whose death was the subject-matter of the particular inquiry, might be given with a view to showing, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died by poison administered by some one. That is the extent to which the authority went, and that is the extent to which I have no hesitation in saying I shall admit evidence as to the other deaths in this case.' But when in reference to one of the other deaths it was sought to elicit who was in attendance on the deceased during her last illness, the prisoners' counsel objected and pointed out that this was going beyond what the Judge had ruled. Such evidence, he contended, was only admissible, if at all, for the purpose of showing the cause of death, but the answer to this question would go far beyond that and tend to prove that one or both of the prisoners caused the death, the very thing the Judge had ruled should not be done. The Judge, however, allowed the question, basing his decision on *R. v. Geering*.

One is forced to the conclusion that here we have a legal 'mystery.' People may fancy they understand how such evidence can be admitted and yet not used in proof of the commission of the act charged; but in reality they understand nothing of the sort. In fact, it is now too late to deny that this kind of evidence may legitimately be used in proof of the act, and that Mr. Justice Wills is right when he recognizes, in his work on *Circumstances Evidence*, that such evidence should not be excluded whenever it is relevant to make out any step in proof of the offense charged.

In the New Zealand case of *R. v. Hall*, already referred to, the Court, whilst holding that system was not in fact established in that case said: 'We are not disposed to deny that the general proposition that a series of similar occurrences, manifestly not accidental, conjoined with proof of the prisoner's agency in one or more of such occurrences, may sometimes constitute legal ground for inferring that the prisoner is the cause of all'; and in the subsequent case of *R. v. Rogan*, to be referred to shortly, the Court of Appeal in New Zealand admitted evidence of this nature for the express purpose of proving the act, though the method of admission may, perhaps, be open to criticism.

The reason for the reluctance to use this class of evidence for the purpose of proving the act is not quite clear; but it probably was

caused, not only by an illicit extension of the general rule prohibiting proof of previous conduct, but also by a perception of the fact that such evidence can, logically, be only explanatory of an act or occurrence; its effect is psychological only. What, however, has not been so clearly perceived is that even thus used, it may tend to the proof of an act.

Such evidence may be used to explain an act constituting an element of an offense—as, *e.g.*, the taking in theft—or it may be used to explain an act which is no part of the offense but merely relevant to the proof thereof. When used in either of these ways, its effect may be to strengthen the proof of the actual commission of the offence. *Makin's Case* is a very good example of this use of such evidence.

To show that any occurrence is an act—that is, the result of human agency and no mere accident—is to explain that occurrence; to show that it is the act of a particular person is still further to explain it. Having admitted the evidence as explanatory, there is no legitimate ground for saying 'thus far and no farther.' The Court must take the whole explanation and, if the result is to show that an occurrence is the act of John Smith, there is no warrant in reason for stopping short at the general conclusion that it is the act of a human being. In practice, the Courts have accepted the full explanation, whilst professing to stop short at the general conclusion.

The psychological fact that is proved by such evidence is a continuing intention. A scheme, design or plan is established and this includes the particular act in question. It may, of course, be objected that merely proving an intention cannot of itself be any evidence of a particular act, and this is an objection that must be met.

It is true, as was stated in *Saxlehner v. Appolinaris Co.* (1897) 1 Ch. p. 900, that if the intention is established it is a step to the conclusion that the intention has been fulfilled. Nevertheless, mere proof of an intention can never amount to evidence that the intention became operative in action at some particular time and place. It must be brought to earth and localized by evidence of some physical fact. It is like the evidence of motive in this respect—useless by itself, but extremely useful in corroboration. As was observed in an Australian case, 'Motive in itself is no evidence of a crime. If a murder has been committed it is possible to put one's hand very often on a person who had every motive to commit the deed; but that in itself is no evidence against the suspected person. But if you found evidence against him then the motive, taken in conjunction

with that evidence, would make the case much stronger against him that it would be if the motive were absent' (*Mutual Life Co. of New York v. Moss*, 4 L. L. R. 319).

What evidence *aliunde*, then, is required? It would appear that when a system is proved no other evidence is required than that which goes to prove the system. 'In *R. v. Geering*,' observed Johnston J. in *R. v. Hall*, 'which is the first and principal authority, it does not appear, though this may be due to the brevity of the report, that there was any satisfactory evidence of the administration of poison by the prisoner to her husband, independently of evidence admitted of subsequent occurrences, in which she appeared to have been probably concerned.' I do not think the brevity of the report is necessarily to blame, for to establish a system the occurrence under investigation must first of all, it goes without saying, be established by *prima facie* evidence—not necessarily as an act but as a physical event; then the person concerned, if any sort of plan or design covering the occurrence is to be established, must be connected with that occurrence by evidence similar to that connecting him with the other occurrences comprised in the series.

That is all that is required in cases of 'system,' but it is possible to show a particular passion or emotion by evidence of other acts without establishing a system. In such cases there must necessarily be supporting evidence *aliunde*. As was observed by counsel in *Ball's Case*: 'Proving passion does not prove that the act takes place daily or anything of the kind, and you are charging an offence on that particular date here. No inference can be drawn as to that particular date or period except upon evidence of what took place on that date or in that period. The evidence must be of what happened at that time' (VI C. A. R. 38). This is no doubt too broadly stated; but, if taken as pointing out that there must be evidence pointing directly to the particular occasion and that mere proof of a passion cannot supply the want of such evidence, then it is well-founded. No doubt in most cases of this class a system is established but it sometimes happens that some particular passion is established by acts which are quite unsystematic—even spasmodic—and the distinction between such cases and those in which system is proved must be noted.

In *Ball's Case* Lord Atkinson observed: 'Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased and that is evidence not merely of the malicious mind with which he killed the deceased but of the fact that he killed him.'



No proof of the systematic expression of the enmity in word or act is required; it is sufficient that it has been expressed against the person murdered (*R. v. Hagan*, 12 Cox C. C. 357).

It would appear, then, to be reasonable to require in these cases *prima facie* evidence *aliunde* of the commission of the act. When you establish a system you prove it as a whole, and the proof of the whole may be sufficient to establish each part, though the evidence directly bearing on each part might be insufficient to establish it. When, however, unsystematic acts are relied on as showing a particular passion or feeling, then in the absence of other evidence to establish the fact alleged, the proof is entirely psychological, for you have not, *ex hypothesi*, fitted in the act as a part of a series of physical facts, but merely suggested it as a possible result of some mental condition.

Explanatory evidence of the kind here dealt with—or, indeed of any kind—is admitted to elucidate a fact as portrayed in the evidence. There is no rule that the fact must be absolutely established before explanatory evidence can be given in order to prove that what the witness has described in no more isolated transaction but is an incident in a series. If the witness's evidence is equivocal, the effect of the explanatory evidence may be to clear up the equivocation; but if it is not equivocal, the effect is purely corroborative. In the latter case the testimony of the witness is shown to fit in with other evidence. What he has narrated is shown to be a continuation of some design which has operated similarly on previous occasions, and the events described by him are thus placed in their true setting. His testimony is brought into connection with other testimony and gains thereby a cogency which it, perhaps, would not otherwise possess.

In a New Zealand case evidence was given by a witness of his being in a room with the accused when acts of a criminal character were committed. This was the only evidence as to the acts and as to the accused's presence in the room. The defense was a point blank denial of the truth of the story. Similiar instances were proved in order to show that the accused had committed the acts charged against him. It was held by the Court of Appeal that such evidence was rightly admitted; but the ground of admissibility was this—that the jury might believe the witness's statement as to the presence in the room but might not believe (without corroboration) his statement as to the criminal acts, and that the accused's mere presence in

the room was equivocal and the similar instances explained it (*Rex v. Rogan* (1916) 35 N. Z. L. R. 265).

It appears that the counsel for the Crown admitted that the evidence, no matter how strongly corroborative, is inadmissible on the part of the prisoner, that the jury's belief in his presence in the room, contrary to his sworn testimony, must have resulted in a verdict of 'guilty.' This amounts to an admission that such evidence, no matter how strongly corroborative, is inadmissible unless needed for the explanation of some equivocal fact. It is true that the way in which the Court dealt with the evidence cuts this limitation down very greatly—in fact, it whittles it away to almost nothing, for it can very rarely, if ever, happen that a charge can be brought before a Court without some one or more of its elements or concomitant circumstances being of an equivocal character. It follows that, if a witness's evidence can be legitimately treated as the Court in New Zealand treated the testimony of the principal witness in *Rogan's Case*, there is practically no room for the operation of the suggested limitation.

I venture to assert that the method followed in this case is neither legitimate nor necessary. There can be no question that if there had been another witness in the case who had deposed merely to the accused's presence in the room about the time mentioned by the principal witness, evidence of similar instances, having been admitted to explain this evidence, would naturally and properly have been used as corroborative of the statement of the principal witness, and it would not have ceased to be corroborative even if, before the conclusion of the trial, the evidence of the additional witness had been conclusively shown to be perjured; for whether the evidence of the additional witness is there or not the evidence of the other instances is logically relevant and corroborative. One of the Judges (Edwards J.) arrived at this conclusion, and, though there are not any indications in the English cases against it, yet the conclusion is, I submit, logically unassailable.

It will be convenient now to attempt to formulate the law on the questions with which I have been dealing. The following statement appears to me to be in accord with what I believe I have established, though I do not, of course, pretend that it is in the best form for submission to the Legislature:—

Evidence which merely shows that a person has a propensity to do acts of a certain kind, or that his disposition, character or antecedents makes or make it probable that he will act in a certain way

or with any particular intention, is not admissible to prove that he did any such act or acted in such way or with such intention on any particular occasion: Provided that nothing herein shall be deemed to exclude evidence tending to show such matters if it is otherwise relevant, and, in particular (without prejudice to the generality of this proviso), the foregoing provision shall not render inadmissible any evidence which is adduced to show—

(a) That any occurrence is one of a series of two or more similar occurrences, and that the facts of the occurrences comprised in the series indicate some system, plan, or design on the part of any person; or

(b) that any person implicated by any evidence in the commission against or in respect of another person of any particular acts has committed other acts indicative of some passion, emotion or feeling in regard to the other person, which would naturally lead or dispose to the commission of the particular act aforesaid, with a view to establishing—

(i) that the occurrence or act was the act of, or was caused or committed by, the person concerned in such system, plan or design, or so implicated as aforesaid;

(ii) that, being his act or caused or committed by him, it was done, caused or committed by him intentionally or with any particular intent.

The form of the statement suggests some of the limitation which I consider must attach to the action of the Legislature in connection with the law of evidence. It is negative in form, which points to the conclusion that formulated rules of evidence must be principally concerned in stating, not what is, but what is not, evidence. The formulation of such rules is beset with two dangers—they may be ill-conceived and unsound, and they may be too widely stated. The Courts to whom the task of building up the law of evidence has been hitherto mainly entrusted, have erred in both directions. They have imposed many ill-conceived restrictions, and they have made others which are ill-defined and have been given too wide an application. This has imposed on the Legislature a task of correction, and in a series of enactments, prompted mainly by the writing of Bentham, the law has been radically altered by the removal of a number of ill-conceived restrictions. It is to a similar, though much more modest, task—the definition of a restriction which has been given too wide an application—that I would invite the Legislature.

The rule which is here dealt with is one which, I am convinced, is sound in principle and well worthy of consideration by the jurists of foreign countries; but it has been allowed to influence matters that are not properly within its scope at all. With the real exceptions to the rule I have not dealt for they occasion but little difficulty, but the necessary qualifications require careful definition. Those which I have stated are, it will be seen, not exceptions to the rule at all. They are inserted because experience has shown that such matters are very liable to be considered as falling within the rule. To guard against error in this respect, then, must be the main consideration in formulating any statement on this part of the law.

More than this I have not attempted. To define what is a "system," or to provide a little code specifying all matters which can be possibly proved by similar instances, would be labour in vain. When it has been declared that evidence which is 'otherwise relevant' is admissible, the field is left clear for the exercise of the logical faculties of the tribunal. Thus, evidence of similar facts may be used, even without establishing system, to prove knowledge, but it is not necessary to state this formally, as the reason can, in a proper case, arrive at the conclusion without the aid of any formal rule, and rules which are devised with the idea of relieving people of the trouble of thinking generally end by becoming a troublesome fetter on the reason.

# SOUTHERN STORIES

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## A BIG DIFFERENCE.

"Several of us were soliciting for the War Work Fund and on approaching a negro woman asked her if she would not give her mite towards the welfare fund for the soldier boys."

"De welfare fund?" "What in de hebben does you white folks means" It was explained to her.

"I done gib 2 uv ma sons for warfare and sho' am not goin' to gib anything for welfare. Not me, not me, gentlemen."

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## NATURAL GIFT SUFFICIENT.

Marks—Would you marry a woman lawyer?

Parks—Heaven forbid! An ordinary woman can cross-examine quite well enough.

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## THE MAIN CHANCE.

The train had crashed into an auto near Jackson, Mississippi, and one of its occupants was dead and the other was badly mauled. Soon afterwards Isaac came along

"Vot happened?" said Isaac.

"Train," answered the injured man.

"Has the adjuster bin here yet?" quickly queried Isaac.

"No."

"Then, yust moof over a leedle an' let me lie down beside you," eagerly said Isaac.

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## SAVING HIS FRIENDS.

A tough old bird was dying and his wife sent out for a preacher. The preacher came and said to the dying sinner:

"You had better renounce the devil, my friend."

"Renounce the devil!" exclaimed the dying man. "Why, I ain't in a position to make enemies right now."

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## EMBARRASSING MOMENT.

Podger (to new acquaintance)—I wonder if that fat old girl is really trying to flirt with me?

Cooler—I can easily find out by asking her—she is my wife.

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## WENT A FEW BETTER.

Two colored women were discussing the war.

"Well, honey," said Aunt Caroline, "I done give two sons to this here war."

"Lord, chile! That ain't nothin'," replied Matilda, "I got three husbands over there now, and if this last one I got don't do better I'm gwine send him over soon."

### A NAUGHTY JUDGE.

In a case of slander in the New Orleans courts a lady had gone into the witness box on behalf of the plaintiff, whose counsel was examining her.

"Now, madam," the lawyer began, "please repeat the slanderous statements made by the defendants on this occasion just as you heard them.

"Oh, they are unfit for any respectable person to hear," was the emphatic answer.

"Then," said the examiner, coaxingly, "suppose you just whisper them to the Judge."

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### TWICE IN THE SAME PLACE.

"Come here, porter, you left one black shoe and one tan shoe under my berth this morning—what about it?" The porter scratched his head for a few seconds and responded: "Funny, boss, shure 'tis funny; dat's de secon' time dat's happened dis morning—wonder how come?"

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### FOR MEN ONLY.

The storm was raging and the rain poured—lightning flashed—trees fell all around and Parson Zaccariah Jones thought every minute would be the last for his little flock assembled in their place of worship, to say nothing of his personal safety. His flock huddled close and the more the parson preached the worse the storm raged and death seemed to stare them in the face. When lightning struck right near the church and the whole world for a moment seemed in a blaze the parson leaped clear of his pulpit, landing on his face and sent up a prayer that sounded great comfort to his terrified flock: "Gawd," he wailed, "we are in sore distress—help us quick, O Lawd—come Gawd, save us, en don't sen' yore Son, case dis aint no place fer children.

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### GUARDING HIS FLOCK.

Parson Jackson was up before the deacons of his church for hugging and kissing one of the women of the church. There was no question about his guilt, so he had to put up a defense and his defense was that he was the shepherd of the flock and deemed it his privilege to hold in his arms and fondle a lamb whenever he so desired. Parson was the best preacher they had been able to get and the deacons were disposed to be lenient with him, so after much deliberation they handed down the following decision on Jackson's actions and defense: "We grants dat the shepherd might hold in his arms a lamb of his flock, but ef he must do et, hereafter, he must see to et dat he holds in his arms a ram lamb."

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### WISED UP A BIT.

Burrows—Sorry, old chap, but I am looking for a little financial succor, again.

Bangs—You'll have to hunt further. I am not the little financial sucker I used to be.

# MEDICO LEGAL ETHICS

By George F. Ort, of the Chicago Bar.

What is medicine and the practicing of medicine is much like the inquiry as to what is law, being divisable into three familiar forms. What it is; what it has been; and what it ought to be. The first and second inquiries are important as a means of deduction. A comparison of what it has been with what it is, indicates that it will not remain what it is; and therefore that it is not what it ought to be.

In other words the world of a day or a year is not a very large world and legislators, courts and the professions, in considering the law of medicine frequently either are obsessed by immediate selfish interest or from ignorance or negligence fail to observe a philosophical perspective of the subject.

A notable instance of a difference of opinion between a registrar of vital statistics and an attorney general will serve to illustrate many of the suggestions of interest or opposition in official quarters mentioned in these papers. This has a peculiarly close reference to chiropractic insofar as it consists of manipulative curing without drugs, etc.

The Attorney General of Ohio has just rendered an opinion settling a long and bitter controversy in Ohio, which will have a far-reaching effect as a precedent in many other states. He rules that an osteopath is a physician without limitation as to what diseases he may treat and that he may sign death certificates and all other such documents.

The opinion was requested because of the refusal of the State Registrar of Vital Statistics to accept a death certificate signed by an osteopathic physician. This decision is overruled by the opinion of the Attorney General who says in part:

"The osteopathic physician who complies with the educational qualifications of the General Code which requires of an osteopath a preliminary education as is required by law of applicants for examination to practice medicine and surgery, and which enumerates the subjects in which he is examined by the State Medical Board, and who passes such examination, receives a certificate from such board. Such certificates shall authorize the holder thereof to practice osteopathy and surgery in the state, but shall not permit him to prescribe or administer drugs, except anesthetic and antiseptics.

"It will be noted that there is no limitation as to the diseases an osteopath may treat. He takes the same examination in diagnosis as is taken by the physician for the practice of medicine. He is as fully equipped under the law for the diagnosing of any disease or ailment, if he meets the educational requirements outlined by the statute, as any other person can be. The present statutes relating to osteopathy refer to the practitioner thereof as a physician, the only qualification thereto being the term 'osteopathic'. It is reasonable to believe, and perhaps apparent, that the statute recognizes him

as a physician and further uses the word 'osteopathic' to designate the school to which he belongs in the same sense as 'allopathic' physician is ordinarily distinguished from 'homeopathic' physician, 'osteopathic' indicating that the use of drugs is not permitted or desired, where allopathic and hoemopathic prescribe drugs for the treatment of a patient, the distinction as between the last two being in the prescribing itself.

"From the above considerations no reason is apparent why the osteopathic physician is not included within the terms of Section 210—G. C. He is qualified and the tendency of the law to recognize him as a physician is apparent.

"You are therefore advised that an osteopathic physician who meets the educational requirements of the law, can properly sign a death certificate."

The term "medicine" in its modern sense, as construed in statutes and decisions has a very general meaning. In one sense it means a substance or matter such as a drug or an herb which is used as an agent of healing; while in another respect it may mean any method, manual, mental or spiritual without the use of any drugs, etc. In either sense it may be either or both curative and preventive.

Historically the practice of medicine may be divided 1st into the period prior to Hippocrates (prehistoric); 2nd the Greek and Roman (460 B. C. to 476 A. D.); 3rd, Mediaeval (476 A. D. to 1493) to Paracelsus; 4th Philosophic (1492 to 1822) to Pasteur; and 5th Scientific (1822 to date).

The ancient Egyptians had well defined notions as to the physically curative effect of diverse drugs and medicines, many of which are in common use at the present day by the different schools of medicine.

By way of comparison the ancient Hebrews used a preventive system consisting of elaborate ceremonial ablutions and including the one element of surgery, circumcision, thus combining with a large degree of faith, a small element of material substance.

The same cleavage has persisted between systems in a general way and has been taken as a dividing line between barbarism or atheism and theism. However, modern schools where material, political or social interests do not prevent, are inclined to avail themselves of suitable elements of both methods.

The theorizing of the older periods has given place to experimentation covering the many branches such as biology, chemistry, physics, psychology, pharmacology, physiology, anatomy, toxicology and the application of medicine in its various forms and treatments, which indicate that in clinic and laboratory at least the work is so far on a scientific basis that nothing is taken for granted but it is the hope that in due time the practice of curative medicine will be supplanted by a system of a preventive practice by means of hygiene, physical culture, inoculations, etc.



Obviously such a system cannot prevent the evils of the accidents of malformations and violence, howsoever thoroughly the system considered as a classification of facts may be entitled to be called a science. The utmost that can be looked forward to is the discovery of causes of epidemics and their prevention.

During the 3rd or Mediaeval period the ancient use of drugs and other curative substances as an art was probably lost in the superstitions of the "Dark Ages" only to be revived by the renaissance following the Mohomedan dispensation.

Our own grandmothers lived in an atmosphere of martyrdom due as they supposed to the visitation of ill health as a divine dispensation. It is obvious, however, that the contemporaneous vogue of atheism was a counter-irritant, whichever may have been cause or effect.

The theoretic or speculative medicine of the 4th period (*supra*) made it seem consistent to leave surgery to the barbers. Blood-letting became a favorite prescription. The practice of natural bonesetters was in high favor. The Sweet family were adepts. This was reduced to a thesis by Waterman Sweet (*Prac. of Nat. Bonesetting, Schenectady 1844*). They were without any medical education, yet they were very successful.

The more recent vogue of removing the vermiform appendix still is highly favored. This may be due to a mooted theory that the removal of other similar useless sacks, ducts or glands may solve most if not all the problems of curative as well as preventive medicine.

The claim which chiropractic makes upon our attention has to compete with a multitude of other things, each of which is clamoring in a distinctive note of its own for our exclusive recognition. The discordant condition is not conducive to any meditated selections of things of a permanently beneficent nature. The result is a haphazard survival in a scramble in which substantial merit is not by any means usually successful. On the contrary, the public propensities created by interested cliques are such that those thoughts, ideas, things, usually become most popular which make up with noise what they lack in merit. The process is almost discouragingly slow by which a thing of merit becomes a fixture.

Illustration of experiment and good, lasting, result is when Auenbrugger (1722-1809) discovered a method of diagnosis by percussing the chest; he was greatly ridiculed at first, but his method has proved of incalculable benefit.

Mental medicine was not definitely appreciated until Emil Kraepelin systematized it as a study, (1856). By these schools it has be-

come popular as a method to establish the intellectual capacity of children.

Psycho-Therapy was established as a new psychology by Freud in 1895 and carried forward by Jung and Adler (1857-1911).

More recently diverse forms of manual manipulation such as Osteopathy have come into vogue. Osteopathy is characterized as "bloodless surgery" of which Dr. Adolph Lorenz probably is the chief exponent.

Another of the methods of manual manipulation is Chiropractic which has lately been making wide progress throughout the country. By the theory of this system disease is due to pressure upon the nerve at the point where it leaves or emerges from the spinal column, such pressure being caused by displacement or malformation of the vertebra beside which the nerve emerges.

In addition to those mentioned there is the vogue in various forms of so-called Faith cures. These systems are practiced both in a curative and preventive way, of which Christian Science is commonly supposed to be the principal method and which is explained in "Science and Health and Key to the Scripture." (Mary Baker Eddy). The theory is that the affirming of the efficacy of good and denying the validity of evil, of thought, word, act or condition will abolish sin, disease and poverty. The teaching of this system is known throughout the civilized world. It may be said to epitomize the preventive medical elements of the Jewish and Christian religions and to finally embody for the Christian religion a form of mysticism analogous to the corresponding by-product of every great religious dispensation.

Beneficent as all these methods of healing may be they are not available without money and without price. The span of life is so short and the distribution of wealth so meager and irregular that the time spent by the individual whether as a common laborer or in the fine arts, sciences, or professions must at the same time be his source of livelihood. Accompanying the process is the malcontent which we have always with us and which misuses the means of livelihood to the detriment of the public health, morals, safety and general welfare and thereby for the protection of these, necessitates the exercise of the police power of the state for the protection of society.

The right to practice medicine in the various States, is evidenced by a license required by statute to be obtained from the State Boards of Health or Board of Medical Examiners. The examination required in order to obtain such a license usually is in writing. The applicant must be twenty-one years of age and of good moral character and have a diploma showing the degree of M. D. from a medical institu-

tion after a course of at least four years of study, (except Colorado, Massachusetts and Oregon). These requirements are not uniform in all the states as to what is a proper medical college degree. The greater number of statutes do not recognize a college unless one of its preliminary requirements is that the student have had at least one year of study in a college of liberal arts. Most of the statutes provide certain reciprocity in requirements of other states before accepting their diplomas as to qualifications for entrance to the examinations for licenses. The matter is left to the State Boards, in North Carolina, Louisiana, Florida, Kansas and Idaho. No preliminary education is required in Oregon and Massachusetts. The subjects of examination usually are: Medicine, materia medica, and therapeutics, pathology, surgery, physiology, anatomy, chemistry, bacteriology, and obstetrics. In Pennsylvania, Connecticut, New Hampshire, Georgia, Maryland, Florida, Louisiana, Arkansas and the District of Columbia there are two or more examining boards on account of the existence of different schools of medicine; but in most of the states one examining board examines candidates from all the different schools.

By a statute of Henry VIII, the right to practice as physician or surgeon was restricted to members of the corporation organized for that profession. Admission to the profession was regulated in New York by colonial legislation as early as 1684. At the present time in the United States the right to practice is regulated by statute of the several states .

A license to practice medicine is granted upon evidence of qualification according to requirements which vary in different states, the following being the usual systems: admission upon presentation of a diploma from a reputable medical school or college; admission upon examination by official boards of examiners; and a combination of the diploma and examination system either so that one will be sufficient, or so that both are required, or so that an applicant for examination must show a specified number of years' study.

American Medical Assn. Law & Board Rulings (1914), Review of Legislation. 1901, published by the New York State Library, pp. 101-107.

Generally the statutes require proof of qualification only of those who shall in the future desire to begin the practice of medicine; the law may, however, apply to existing practitioners tests of fitness to continue in the practice of their profession.

Dent v. West Virginia, 120 U. S. 114.

It has been held that where a license fee is imposed, existing practitioners cannot be constitutionally exempted from it.

State v. Pennoyer, 65 N. H. 113, 5 L. R. A. 709.

On the other hand, the statute as a matter of comity between the states may accept the fact that the applicant has practiced for a number of years in one or more states as sufficient evidence of qualification in other states, in lieu of either diploma or examination.

*Williams v. People*, 121 Ill. 84; *State v. Vandersluis*, 42 Minn. 129.

Exceptions as a matter of comity are frequently made in favor of medical practitioners residing in other states who may be called in for consultation or services in special cases.

*State v. Van Doran*, 109 N. C. 864; *Parks v. State (Ind.)*, 64 N. E. 862.

## MEDICO LEGAL ETHICS AS APPLIED TO CHIROPRACTIC.

Curiously, the law, while it assumes for itself the quality of a system which responds and expands to the requirements of the progress of society, by considering what the law has been, the arising difficulty and the remedy, does not uniformly apply the same rule to the progressive necessity of modern schools of medical practice nor apparently to a uniformity which the country-wide sameness of disease and healing would seem to suggest. This matter is more nearly approached by the judicial decisions hereinafter cited than by the legislation referred to. The decisions recognize possibilities of wrongful exclusions of representation of certain schools of practice from legislation, state boards, educational requirement and applicants for license, but leave the solution in the hopeless suggestion of discretion necessarily left in the personnel of the various state examining boards.

Where a license is required, the practice of medicine without it is forbidden and punished, and it becomes important to determine what is meant by the practice of medicine. The question may arise in connection with the administration of domestic remedies, emergency services, and the recommendation of medicines kept for sale,

*People ex rel. St. Bd. Health v. Lehr*, 196 Ill. 361, 63 N. E. 725.

This may apply also to treatment by massage, nursing without the use of medicine or operative surgery, and mental or spiritual treatment. In some states the law has been held to apply to Christian Science and to Osteopathy,

*State v. Buswell*, 40 Nebr. 158, 24 L. R. A. 68;  
*Little v. State*, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717.  
*People v. Gordon*, 194 Ill. 560, 62 N. E. 858;  
*Bragg v. State*, 134 Ala. 166, 58 L. R. A. 925, 32 So. 767.

And the services of a Clairvoyant physician have been held to be medical services;

*Bibber v. Simpson*, 59 Me. 181.

In other states methods of healing not using medicine or surgery are regarded as not within the spirit of the law,

*Smith v. Lane*, 24 Hun. 632;  
*State v. Mylod*, 20 Rh. I. 632, 41 L. R. A. 428;  
*Nelson v. State Bd. of Health*, 22 Ky. Law Rep. 438, 50 L. R. A. 383;  
*State v. Loeffring*, 61 Oh. St. 39, 46 L. R. A. 168.

The law of Illinois, Ill., Stat. Apr. 24, 1899, Sect. 7, defines practice of medicine as treating, or proposing to treat, operating on or prescribing for any physical ailment or any physical injury to or deformity of another, but excludes from the operation of the act the administration of domestic or family remedies in case of emergency. Treatment by mental or spiritual means, without the use of any drug or material remedy is excluded. The phrasing of a particular statute may be conclusive as to its application to certain methods of treatment, and the decision may turn in part upon the interpretation given to such terms as "appliance" or "agency;"

*Hayden v. State (Miss.)*, 33 So. 653.

The provisions of the law regarding study and examination may also be relied upon to show that they were intended to apply only to particular schools of medicine,

*State v. MacKnight (N. C.)* 42 S. E. 580.

Massachusetts provides that the act for the registration of physicians and surgeons shall not apply to Osteopaths, Clairvoyants or persons practicing hypnotism, magnetic healing, mind cure, massage, Christian Science or cosmopathic methods of healing, if they do not hold themselves out as practitioners of medicine, or practice, or attempt to practice medicine in any of its branches.

Rev. Laws, ch. 76, Sec. 9.

The several states go further, and cover at least the traditional methods of professional treatment irrespective of the use or title or designation indicating professional standing. It is not clear that private treatment, not for money, and not as a matter of profession, can be entirely prohibited.

The neglect of parents or others to call in medical aid for those who are in their custody has been made an offense by statute.

*People v. Pierson*, (N. Y.) 68 N. E. 243;  
*Reg. v. Downes*, 13 Cox C. C. 111.

As a matter of constitutional principle, which has not yet obtained full recognition, as applied to medical examining boards, it

is a question whether licensing and examining powers should be granted to particular named associations or institutions.

Privileges of this kind have been sustained in California and Maryland, where the power was given to medical societies to appoint or elect medical examiners,

*Ex parte Fraser*, 54 Cal. 94;  
*Scholle v. State*, 90 Md. 729, 50 L. R. A. 411.

In Indiana the right of the State Dental Association was sustained on the ground that appointment to office is a duty and not a privilege.

*Ferner v. State*, 151 Ind. 247, 51 N. E. 360.

The Supreme Court of Massachusetts, in sustaining an act which made the right to practice medicine dependent on a license obtained from the State Medical Society or the University, said that if the power had been confined to the medical society exclusively, there might be ground for doubt, but that the difficulty was removed by the licensing power being equally conferred upon the University,

*Hewitt v. Charier*, 16 Pick. 353, 1835.

It has, however, been held that the fact that one school of medicine is not recognized in forming boards of examiners does not in itself constitute discrimination, unless it can be shown that applications for admission are improperly rejected,

*Allopathic State Board, etc., v. Fowler*, 50  
La. Ann. 1358, 24 So. 806.

Some discretion must, in the nature of things, be left to the State in selecting examiners, and some discretion must be exercised by the examiner in passing upon qualifications. But the discretion must be a fair one in either case, and the courts must have power to control its abuse.

In the following case it was said that:

"In a case where it was clear from the evidence that a discrimination had been made against a system of medicine, we should not hesitate to hold that the board had exceeded its power."

*Nelson v. State Board of Health*, 22 Ky. 1, Rep. 438, 50 L. R. A. 383; *State Board of Dental Examiners v. People*, 123 Ill. 227.

The Supreme Court of Massachusetts in an earlier case upheld an act requiring a license from either the State Medical Society or from the University, but intimated that the vesting of the power in the medical society exclusively might be of doubtful validity. Even the recognition of two bodies to the exclusion of all others would now, in many states, be regarded as creating an unconstitutional privilege or monopoly.

*Hewitt v. Charier*, 16 Pick. 353.

Unjust discriminations in the tests of fitness may, however, violate the principle of equality. It is therefore important to note

that no statute makes the right to practice medicine dependent upon the recognition of some particular school of medicine.

Care is generally taken to give the principal schools (homeopathic and allopathic) representation upon the examining board, or boards, but it was held that the exclusion of eclectic examiners is not in itself discrimination, unless it can be shown that applications for admission are improperly rejected.

*Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 South, Rep. 809.

In Kentucky it was said: "In a case where it was clear from the evidence that a discrimination had been made against a system of medicine we should not hesitate to hold that the board has exceeded its power."

*Nelson v. State Board of Health*, 22 Ky. Law Rep. 438, 50 L. R. A. 383, See also *State v. Gregory*, 83 Mo. 123.

From the necessity of the case, much must be left to the discretion of the examining or licensing authorities, not only in determining the qualification of the applicant, but also in determining what is a reputable institution or institution in good standing for the purpose of recognizing its diploma,

*State ex. rel. Coffey v. Chittenden* (Wis.), 88 N. W. 587.

Administrative action is held to be due process of law, and where an appeal is granted, it may lie to other administrative or executives authorities, as in Ohio, to governor and attorney-general.

*France v. State*, 57 Oh. St. 1, 47 N. E. 1041.

Since a person ought to be entitled to admission to practice as a matter of right on proper qualification, there must in compliance with the 14th amendment be an ultimate remedy in the courts against gross partiality or abuse of discretion.

In accordance with this rule courts have given relief by mandamus where the board made requirements not prescribed by the statute,

*State v. Lutz*, 136 Mo. 633.

In another case where the statute left the determination of the reputability of a school to a foreign body or refused to recognize a diploma after having recognized an institution as reputable, similar relief was granted,

*State Board of Dental Examiners v. People*, 123 Ill. 227.

(Note: The greater number of cases heretofore cited in these articles are taken from Freund on Police Power (1904). Later decisions will be referred to hereafter).

*(To be Continued)*

# STATUTORY LIS PENDENS

By Frank C. Hackman of the Seattle, Washington, Bar.

(Editor's Note:—This the third of a series of articles by Mr. Hackman, touching upon powers exercised by the Federal Government with respect to real property.)

The doctrine of lis pendens and statutory notice of lis pendens are of direct interest and concern to purchasers, mortgagees and others having any transaction in land, and necessarily should command the attention and consideration of abstracters, insurers of titles, title examiners, lawyers and all others who have anything to do with titles to real property. Indeed, the whole subject of lis pendens is of practical importance, and yet one may safely say it is not generally well understood. In this article but one topic of the whole subject will be reviewed, and that one topic is whether or not state statutes requiring the docketing, filing or recording of notices of lis pendens apply to actions or suits, within the scope of such statutes, instituted and pending in federal courts.

The docketing, filing or recording of formal notices of lis pendens, was not required or provided for by common law or equity, and are made necessary only by statute in some states. The object of these statutes is to afford bona fide purchasers record notice of pending actions. Congress has never enacted such a law as to litigation in federal courts. Whether or not state statutes must be complied with by parties to actions or suits in federal courts has not come before the Supreme Court of the United States for decision. Considering the relatively large number of decisions upon the doctrine of lis pendens, and the amount of litigation in federal courts involving real property, it is rather surprising that there have been but few decisions upon the particular topic of this article. Each of these decisions has, of course, dealt with the statute of some one state. They are not in harmony; decisions being at variance even in cases involving state statutes containing similar provisions.

The earliest case arose in California. In this one the Court observed that state statutes regulating remedies are ordinarily to be understood as applying only to proceedings in the courts of the particular state, unless clearly intended to have a wider scope; and in the absence of a clear expression of the legislative will to that effect, it is not to be inferred, waiving the question of power, that a state statute is intended to furnish remedies to suitors in federal courts, since the latter derive their powers wholly from the Constitution and laws of the United States. And it was held the California statute, which did not specifically mention federal courts, did not



contain any indication that it was intended to apply to federal courts, or to afford a remedy except to suitors in the state courts of that state. In this case the question was also presented, whether the state statute had been adopted as a rule of practise in equity cases, by the rules prescribed by the Supreme Court of the United States, or of the Circuit Court, and the Court held no such rule had been promulgated. *Majors v. Cowell*, 51 *Calif.* 478; 1876.

In Virginia a statute provided, in substance, no *lis pendens* should bind or affect a bona fide purchaser, without actual notice of such *lis pendens*, unless a specified notice was left with the clerk of the county or corporation wherein the land was situate, who should file and index it. The United States Circuit Court of Virginia (Western Division), in what may be said to be the leading case on the subject under discussion, held this statute did not control the effect of a judgment in ejectment in a federal court in that state. The Court expressed the view that if the statute was to be considered applicable, the strongest arguments in support of such conclusion were the decisions of the courts holding state statutes of limitation and of exemption applied to judgments rendered in federal courts, under the provisions of the thirty-fourth section of the judiciary act (*Act Sept. 24, 1789, c. 20*), making state laws which are rules of property, and not in contravention of the federal Constitution, laws, or treaties, the rules of decision in trials at common law.

"But the difficulty with this argument", said the court, "is that judgments of the Virginia federal courts in ejectment may be rendered nugatory unless the state court clerks record memoranda of federal pending suits. To construe section 721 Rev. St. (34th section of judiciary act above mentioned) as adopting the Virginia *lis pendens* statute, with the admission that the federal courts have no power to require the state court clerks to record such memoranda, is forbidden by the settled course of decisions of federal courts, which enunciates a fundamental principle vital to the continued existence of the jurisdiction of the federal courts in many important respects. \* \* On consideration of the question of the power of the federal courts in Virginia to compel the state court clerks to record such memoranda, I fail to find satisfactory reason for holding that they have such power. It may, for present purposes, be conceded that the issue by the federal court of a writ of mandamus to compel a state court clerk to record such a memorandum would be, not an exercise of original jurisdiction, but of an ancillary jurisdiction, \* \* necessary for the exercise of or necessary to make effective the jurisdiction of the court already obtained. But the federal court cannot by mandamus compel a state official to perform even a clearly ministerial act, involving an exercise of discretion, unless the law makes it the duty of such official to perform such act. It is true that the Virginia Legislature enacted the *lis pendens* statute with knowledge, actual or implied, of the provisions of the thirty-fourth section of the original federal judiciary act. But it does not necessarily follow that the Legislature intended that the *lis pendens* statute should make it the implied duty of the state court clerks to record memoranda of suits pending in the federal courts. The argument that such intent did not exist is at least as strong as, and to my mind stronger than, the argument that it did exist. The

form and nature of the statute are such that an express provision therein that no suit pending in the federal courts of this state shall affect innocent purchasers, unless a memorandum be recorded in some state court clerk's office, would have been unbecoming, and an assertion of a power not vested in a state legislature. Under such circumstances, no rule of construction authorizes us to construe the statute as implying such provision. If there has been enacted contemporaneously with the lis pendens an express provision requiring the state court clerks to record memoranda of federal pending suits, a different question would be presented. But as the state law, as it now stands, does not necessarily make it the duty of such officers to record such memoranda, the federal courts have not the power to require them to perform this duty. \* \*

"The true ground for holding that the lis pendens statute does not apply to suits pending in the federal courts is that suggested above, and stated in the numerous federal decisions holding that state statutes requiring judgments to be docketed in the county where the land lies, do not affect judgments of the federal courts in such states. It is that Congress does not intend, when adopting state laws, to adopt such as have the effect of limiting or controlling jurisdiction and power of the federal courts, when such effect can only be obviated by the voluntary act of state officials over whom the federal courts have no power. If the Virginia Legislature were to enact a statute making it the duty of state court clerks to record memoranda of pending suits and attachments in the federal courts, there might possibly be no further difficulty. But until this is done, the situation in respect to federal pending suits and attachments is that which existed in respect to the lien of federal judgments prior to the congressional statute of 1888 (*Act Aug. 1, 1888, c. 729*) \* \*."

The Court then quoted the opinion of Judge Hughes in *U. S. vs. Humphries*, *Fed. Cases* No. 15,422, upon the matter of a state judgment docketing statute and his decision that it had no application to judgments rendered in the federal courts in the state, declaring it to be a "rule having few exceptions that in any case of a law of a state conferring rights upon conditions or with exceptions, and adopted by Congress as operative in that state, whenever the exceptions or conditions depend upon the action of state officers, so that the judgment of rights thus once conferred could be defeated or divested by the action or refusal to act of a state officer, such a condition or exception in the state law is uniformly held by the United States courts not to limit the rights conferred by the act of Congress adopting the state law." And the Court held that "as there is no power in the federal court to require the state court clerks to record memoranda of federal pending suits, that the lis pendens statute cannot be treated as a rule of decision \* \* ", and therefore did not apply to actions in the federal courts. *King v. Davis*, 137 *Fed.* 222; 1905.

The Circuit Court in Ohio, (Southern Division), held a statute of that state providing that "when the summons has been served or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject-matter thereof as against plaintiff's title,"—to be a rule of procedure, and not a rule of property, and, therefore, not binding upon the federal courts in suits for partition in that state, *McCloskey v. Barr*, 48 *Fed.* 130; 1891.

In *Stewart v. Wheeling*, 2 *L. E. R. Co.*, (53 *Ohio St.* 141, 41 *N. E.* 247, 29 *L. R. A.* 438, 1895,) it was said: "In the federal courts, actions are not brought in counties, but in the district or circuit where jurisdiction of the parties and subject-matter may be properly obtained: and throughout the territorial limits of that jurisdiction their judgments operate as liens, and actions pending as constructive notice, like those of state courts within their appropriate jurisdiction". So the state lis pendens statute had no application to federal courts. And this conclusion was reached in *Rutherglen vs. Wolf*, *Fed. Cases*, No. 12,175, (1876); *Shufeldt v. Jenkins*, 22 *Fed.* 356 (1884); *Wason v. Hefflin*, 81 *Ind.* 35, (1881).

In Louisiana the *lis pendens* statute provided: "That \* \* \* the pendency of an action in any court, state or federal, in the state of Louisiana, affecting the title, or asserting a mortgage or lien upon immovable property, shall not be considered or construed as notice to third persons not parties to such suit, unless a notice of pendency of such action shall have been made, filed or registered in compliance with" specific requirements as to contents and recordation in the mortgage office of the parish where the property affected is situate. The Circuit Court of Appeals in Louisiana (First Circuit) held that the rule that a decree in equity is binding upon one who purchases the property, which is the subject of the controversy, from a defendant in the suit while it is pending, is one of procedure, in that it prescribes what is required when a different requirement is not prescribed by a paramount authority. And that it is also true that equity causes in federal courts are expressly excepted from the operation of the conformity statute, with the result that practice, pleadings, forms and mode of procedure in equity in federal courts are uniform, and not governed by state laws, statutory or customary. "But federal equity of procedure and practice", said the Court, "is not of such paramount force that a rule which is a part of it may be given such effect as to nullify a law of a state on a subject within the exclusive domain of the state law. Where the substantive law to be administered by the court is that of the state in which the court sits, that law prevails, rather than a rule of procedure with which it conflicts. It is well settled that the acquisition and ownership of real estate and all the means by which title to it is transferred from one person to another, whether by deed, by will or descent, or by prejudicial proceedings, and the construction and effect of instruments intended to convey it, are governed exclusively by the laws of the country or state in which the property is situated, and that such laws of the several states, being rules of property, are binding upon and are to be applied by the federal courts."

The Court held the equity rule of *lis pendens* prevailing in the federal court could not override the state law. And as the state *lis pendens* statute clearly applied to suits in United States courts, suitors in the federal courts in the state had to comply with it to effect constructive notice of the pendency of their litigations. And the Court held, therefore, the reasons which led to the conclusion in the case of *King v. Davis*, supra, that the Virginia *lis pendens* statute was not intended to and did not apply to suits in United States courts in that state, did not exist under the facts of this case. *U. S. vs. Calcasieu Timber Co.*, 236 Fed. 196; 1916.

The *lis pendens* statute of Minnesota, though it did not expressly apply to federal courts, was, nevertheless, held applicable to them, by the Circuit Court (2nd Div.) in that state. The statute was not considered, by the Court, a law relating to procedure, but rather one governing the substantive rights of persons dealing in real estate, determining who is and who is not a bona fide purchaser. In this case the Court took into consideration the statute of Minnesota fixing the duties of registers of deeds (in whose offices the *lis pendens* statutes were required to be filed,) and requiring them to record all notices presented to them, and held that this statute obviated the difficulty presented in the case of *King v. Davis*, supra, and, therefore, the rule in that case had no application to the facts in this. *U. S. v. Chicago M. & St. P. R. R.*, 172 Fed. 271; 1909.

And the Kentucky *lis pendens* statute, though it did not expressly include or refer to actions or suits in federal courts, was held to apply to them, as a rule of property in that state, and the Court in this case said: "If the clerk of the county court (in whose office the *lis pendens* notices were required to be filed) should refuse to do his duty in regard to it, he could be compelled by proper proceedings to do so." *Tenino Coal Co. vs. Sackett*, 172 Ky. 729, 190 S. W. 130, Am. Cas. 1917 E. 629; 1916.

The foregoing are all the decisions upon the question here under consideration, a most diligent investigation has discovered. In *King vs. Davis* and *Stewart v. Wheeling etc., Co.*, supra, some fundamental principles applicable to the subject are set forth, and a correct conclusion drawn there-

from. But in none of these cases was consideration given to the broad general principles that are applicable to the facts in each and every one of them, and which, had they been given consideration, would have led to a like conclusion in all.

The doctrine of *lis pendens* is the jurisdiction, power, or control which courts acquire over property involved in a suit, pending the continuance of the action, and until its final judgment therein. (*Dupee v. Salt Lake Valley Loan etc. Co.*, 20 *Utah* 103, 57 *Pac.* 845, 77 *A. S. R.* 902.) The rule is co-extensive with the territorial jurisdiction of the court. As said in *Stewart vs. Wheeling, etc. Co.*, *supra*, when a suit or action is brought in a circuit or district court of the United States, it brings within the operation of the rule all property affected by it, within the boundaries of such district or circuit, without respect to county lines and without respect to the boundaries of the jurisdiction of state courts. Any state *lis pendens* statute that requires the docketing, filing or recording of a notice of *lis pendens* in the office of some county or municipal officer (as in the Virginia statute above noted,) where in is situate the real estate affected, in order to make a *lis pendens* operative, obviously has a purport and effect analogous to state statutes requiring similar docketing, filing or recording to make judgments effective. Both operate to impose restrictions and conditions upon the territorial jurisdictions of federal courts. The applicability to federal courts of state laws requiring the docketing of judgments has been well settled by judicial decision and by federal legislation in harmony therewith. The article on the liens or judgment of federal courts appearing in the January-February issue of *The Lawyer and Banker* fully discusses the subject. As there stated, until Congress expressly, by legislative enactment, (Act August 1, 1888) assented to the application to federal courts of state statutes requiring docketing, filing or recording of judgments with some county officer of the county wherein was situate the property affected, such statutes did not apply to federal court. Congress adopted the "process and modes of proceeding" in the states reference to the jurisdiction of the federal courts, and not with a view of limiting jurisdiction of these courts. (*Mas-singill v. Downs*, 7 *How.* 760, 12 *U. S. L. ed.* 903. And see Jan-Feb issue *The Lawyer and Banker*, pp. 33, 34, 35.)

By analogy of principles applicable alike to judgments and *lis pendens* it can be said, in view of judicial authority and Congressional legislation as to judgments of federal courts, that state *lis pendens* statutes requiring docketing, filing and recording, do not apply to federal courts. They cannot be made applicable by rule of court, as intimated in *Majors v. Cowell*, *supra*. Nor would the fact that the state *lis pendens* statute expressly included federal courts within its provisions make the state statute applicable as intimated in *King vs. Davis*, *supra*, or as held in *U. S. v. Calcasieu L. Co.*, *supra*, or in the other cases above cited. (For statement of principles, see Jan-Feb. *The Lawyer and Banker*, pp. 33, 34, 35.)

Until Congress by legislative enactment adopts state statutes of *lis pendens* requiring filing of notices, they have no effect upon federal courts. People may be ignorant of the all-prevailing operation of the rule of *lis pendens* in federal courts, and buy and sell land on the faith that county records disclose all matters affecting land titles. But records of United States courts are, nevertheless, matters parties are bound to take notice of as they are bound to take notice of records of state courts. (See as to judgments, *Dartmouth Sav. Bank v. Bates*, 44 *Fed.* 546; *Andrews v. Dow*, 6 *How. (Miss.)* 554, 38 *Amer. Dec.* 450.) One cannot ignore the operation of the rule of *lis pendens* as to federal courts, any more than the *lis pendens* rule or statute of a state in its application to state courts. A *lis pendens* is operative as to a litigation in a federal court although no notice of it is filed in a county office in the county where the land is situate, as required by state law.

# TITLE AND ABSTRACT DEPARTMENT

**Frank C. Hackman, Editor in Charge**

## MIDDLE INITIAL AS PART OF A NAME.

It is generally considered that the common law requires and recognized but one Christian name, and that and the sur-name constitutes a person's full and true name. From this has been deduced the rule that a middle name or initial forms no essential part, at least, of a person's name, and therefore, any omission thereof or error therein, in respect to that person's name is immaterial. And this is so generally held and observed as the true principle that it is rarely observed. Courts have held otherwise in some jurisdictions, and with soundness of reason. Consideration of some of these decisions is well worth attention, because they enunciate a doctrine that from one viewpoint would seem to be in harmony with modern conditions.

In Alabama, one W. N. McDonald executed a mortgage to a bank, covering, among other property, a horse. The name W. H. McDonald was signed to the mortgage, and it was duly recorded. The horse remained in his possession. Subsequently, without paying the mortgage debt, he sold the horse to a third party. The question was presented whether or not the filing and recording of the mortgage was notice to the purchaser. The Court said: "But we are of opinion, and so hold, that our recording act together with modern business custom or usage, requires a modification of the common-law rule as to what constitutes a name, if the common-law rules recognizes initials at all. It is the rule in modern business dealings to sign initials only, of one's Christian name. Such being the case, it is very necessary for the speedy transaction of business that the initials should be correctly given where one signs his name, before one should be held to know who the person signing was, merely from the record of the conveyance. It is true that some courts have held otherwise, contending that the property described, together with the identity of the sur-name was sufficient to put the subsequent purchaser on notice of facts which, if followed up, would lead to knowledge of the real fact. But is it not a better rule to require the person taking a conveyance to see that it is correctly signed, than to permit him to take a conveyance incorrectly signed and charge some sub-

sequent purchaser who has been misled by the name signed to pay for property twice, or pay for it once and then lose it?

"There are but 26 letters in our alphabet, and one of these must constitute the initial of every name in the land. The same letter is the initial of a vast number of different names, hence it can be easily seen that, where a person signs his Christian name by initials only, each initial should be correctly written. The common law rule of but one Christian name and one surname and that a wrong middle initial or name is immaterial (if the rule applies to initials), will certainly not answer the modern requirements of business with reference to recorded conveyances being notice to the world of the conveyancer and the property conveyed.

"We doubt if the common-law doctrine of one Christian name and one surname ever really applied (though it has been held to have done so) where the Christian name was signed by initials only. The better rule undoubtedly is that, where the Christian name is signed by the initials only,, the initials taken all together in their regular order should be considered as the Christian name for the purpose of the signature. We therefore hold that the recording of the mortgage signed 'W. H. McDonald' was not constructive notice of the fact that the mortgage was executed by W. N. McDonald." (First Nat. Bk. v. Hacoda Mer. Co., 169 Ala. 476, 53 So. 802, 32 L. R. A. N. S. 243. 1910.)

Considering whether an attachment of property one Henry F. Hawkins in the name of Henry M. Hawkins was valid or void as against a grantee from Henry F. Hawkins, the Supreme Court of Maine said: "Can the name Henry "M." Hawkins be taken to mean Henry "F." Hawkins? Formerly, but one Christian name was known to the law. The omission or insertion of a middle name, or its initial, was regarded as immaterial. Such is, probably, the law of the Supreme Court of the United States, and of many, if not most, of the State courts in this country at the present day. \* \* But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this state (and Massachusetts) the old doctrine must be regarded both by the precedents and practices as overruled. \* \* The English courts have also long since departed from the old rule, under the influence of their statutes of amendments." (Cites English cases holding Charles Hall and Charles James Hall different names; also George Allen and George E. Allen not the same and Nathan Hoard and Nathan S. Hoard not the same.) "It is also with us well settled that a person's middle name may be represented by its

middle initial letter instead of writing the name in full. \* \* There was a distinction in some of the English cases depending on the fact whether the middle initial was a vowel or not. If it was it was regarded as a name of itself. But if a consonant it was not a name. This nice distinction was grounded upon the idea that a vowel can be sounded by itself, but that a consonant cannot be sounded without the aid of a vowel. But this attempted distinction did not receive much recognition in the courts of that country and has received none in the American courts, that we are aware of."

The Court held Henry F. Hawkins and Henry M. Hawkins not the same, and the attachment void; but said had the name been written Henry Hawkins or H. F. Hawkins it would be otherwise. (*Dutton v. Simmons*, 65 Me. 883, 20 Amer. Rep. 729, 1876.

In a Pennsylvania decision what appears to be a very equitable principle was applied. A purchaser had bought a certain tract of land from one Daniel J. Murphy, in which name the purchaser had found the title held of record. He had examined for judgments against that name, found none, took his deed and recorded it. There was of record a judgment against the grantor under the name, however, of Daniel Murphy, which the judgment creditor sought to enforce upon the property acquired by the purchaser. The Court said: "Murphy's title was on the record. Whoever dealt with him on the credit of his real estate was bound to know what appeared in his record title. It was as much the duty of one who was about to trust him with money or goods, because of his ownership of land, to know how and by what name he held it, as it was the duty of one about to purchase the land to make the same inquiries. If the creditor neglected his duty, he must lose in consequence. If the purchaser neglected his he must lose. Because the creditor in this case did not neglect to examine the record, he has a note signed with only part of the maker's name, on which judgment was entered. With no notice of the habit of his vendor to sign notes in several different ways, and with no notice of liens but the record, the purchaser examined, exhausted the means within his reach and finding no lien against Daniel J. Murphy or D. J. Murphy, settled with his vendor and took his deed. If one of these parties must lose, in good conscience it should be he whose neglect to avail himself of the information which the record could have given him made the loss by one or the other inevitable." (*Crouse v. Murphy*, 140 Pa. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Amer. St. 232; 1891.)

And it has been decided that a purchaser from John M. Gruver

who made a search for judgments against that name, was not chargeable with notice of a judgment against John Gruver. (Wood v. Reynolds, 7 Watts & S. 406 Penn.)

Where a statute relative to docketing of judgments required entry upon the book of "the name at length of each judgment debtor," it was held that the object was that the docket should, of itself, furnish reasonably satisfactory evidence whether a judgment existed against the party from whom one was about to make a purchase of real estate. Hence, where title was in E. A. Davis and he conveyed by that name, the docket entry of a judgment against Edward Davis was not constructive notice that there was an encumbrance against either E. A. Davis or Edward A. Davis, where the purchaser had no notice of the actual identity of Edward Davis and E. A. Davis. (Davis v. Heeps, 87 Wis. 472, 58 N. W. 769, 23 L. R. A. 818, 41 Amer. St. 51, 1894.

The record of a deed conveying the W 1/2 of the W. N. Morris survey was adjudged not effective of constructive notice of a claim to the W 1/2 of the W. U. Morris survey. And the Court in this case well observed that with respect to variance of initials the question is not one of idem sonans but one of identity, and that W. N. Morris and W. U. Morris are not identical names of the same person. (Williams v. Thomas, 18 Tex. Civ. App. 472, 44 S. W. 1073. 1898).

In Massachusetts Sarah Sisson and Sarah F. Sisson were held different names. So where service of a writ was made upon a bank as trustee for Sarah Sisson, and the bank having no funds belonging to any person of that name, and acting in good faith, without knowledge or notice that the person intended to be sued was Sarah F. Sisson, lawfully paid over to the latter funds in its possession belonging to her, it could not be made liable to pay them over again to the plaintiff causing the writ to issue. (Terry v. Sisson, 125 Mass. 560. 1878.)

And a tax foreclosure of the property of John E. Carney on publication of a summons against John G. Carney was not sustained on the theory that the middle initial is no part of a person's name. The Court said: "At common law, it is true, a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or middle name were not regarded as of consequence. But since the use of initials instead of a given name before a surname has become a common practice, the necessity that these initials be all given and correctly given in court proceedings has become of importance in every case and in many absolutely essential



to a correct designation of the person intended.' (Carney v. Bigham, 51 Wash. 452, 99 Pac. 21, 19 L. R. A. N. S., 905. 1909).

These decisions are sufficient to show the common law doctrine with respect to middle names or initials is not universally sustained and with apparently sound reason.

But observance of this rule would not seem practical to an abstracter or searcher acting as an agent. Such a one observing the rule, and not having actual notice or knowledge of the matter of identity, might ignore matters of record which his principal, having actual notice or knowledge of the identity would be obliged to take notice of as imparting constructive notice to him. And the failure of the searcher in such cases to note or show the matters presenting questions of identity would not absolve his employer from the consequences of constructive notice, as to any and all matters as to which the latter had actual notice or knowledge of the identity involved.

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#### RECENT DECISIONS.

The Supreme Court of Georgia in a recent decision on an appeal from a judgment in favor of a petitioner for initial registration, upheld the title registration or Torrens act of that state against various contentions that certain of its provisions were unconstitutional. In the decision the Court states: "The act of the General Assembly approved August 21, 1917, (Act 1917, p. 108) known as the land registration act, is an adoption of the Torrens system of the constitution and laws of this state. It follows closely, though differing in some particulars, the registration act of a number of states", and enumerates specific acts of Illinois, California, Massachusetts, Minnesota, Oregon, Colorado, Washington, New York, North Carolina, Mississippi, Ohio, Virginia, Nebraska, and South Carolina.

The Court also said: "The object of the land registration acts will be further noticed in a subsequent division of this opinion; but it will be helpful to call attention at this point to some of the essentials of title to land nowhere to be discovered of record under the system of evidencing title heretofore existing in this state. Among these were: The genuineness of signatures of grantors and of attesting witnesses in recorded deeds; jurisdiction and authority of official witnesses; status and identity of persons professing to be heirs at law; full age of grantors and donees; sanity; the fact and validity of marriage and divorce; prescription; adverse possession; the power and authority of corporate officers; the validity of tax deeds (depending on whether the levy was excessive, etc.) Other illustrations might be given. The land registration act is therefore a remedial statute, and should be liberally construed according to its intent, so as to advance the remedy and repress the evil.'" (Crowell v. Akin, 108 S. E. 791.) The action required for the purpose of initiating a registration of title has the effect of quieting title in favor of the plaintiff, if the decree be in his favor, and thereby operating to estop all those properly before the court from claim-

ing any right, title or interest in or to the land with respect to which the action is brought, against the plaintiff.

It nowhere appears that any Torrens act creates a new system of conveyancing. On the contrary all the usual means of conveying and incumbering property that are made use of under the recording system are preserved and must be made use of. The probate or chancery courts continue to function for the administration of the estates of decedents, minors and incompetents, and as to the estates of decedents to determine heirship and to make distribution. The Torrens system does not operate to make genuine the signature of grantors and of attesting witnesses, if they are not genuine, nor to confer jurisdiction and authority upon official witnesses who have them not; nor to fix the status and identity of persons professing to be heirs at law; nor to determine the full age of grantors and donees, or their sanity, or the validity of marriage or divorce, or the power and authority of corporate officers. These matters concern titles registered under the Torrens system as well as under the recording system. Nor does the Torrens system operate to reveal matters which the recording system does not reveal. A perfectly sane man may purchase property, get his deed, and record it under the recording system, or, if the title be registered, secure registration of title in his name. Thereafter, if he becomes insane, neither the one system nor the other will necessarily reveal that fact. An unmarried man acquiring title to land may record his deed under the one system, or register title in himself under the other and his subsequent marriage will be undisclosed under either system. The authority of officers to act for a corporation is not a matter of record under the one or other of the systems.

We apprehend that the Torrens system does not afford a means for revealing these matters, nor to afford rights arising out of them protection, but seeks to provide a method operative to bar the assertions of these rights.

In Oregon, recently, a decree of registration was set aside. The guardian of a minor entered into a contract respecting property of the minor without authorization in law. An action arose out of the contract resulting in a judgment against the minor, his guardian and others. Execution issued, a levy was made on the minor's land, and it was sold to M, who obtained a sheriff's deed in 1910. In 1911 M instituted an action to register title to the land. The application therefor contained the allegation, among others, that "there are no persons whosever who have, or claim to have, any interest or estate in said real property, either in law or in equity, in possession, remainder or expectancy." The action took the usual course. Notice of the application was published, directed to "all whom it may concern." Decree was entered registering title in M. The minor, Kirk, on coming of age, brought suit against M to remove the cloud on his Kirk's, title, to have declared void, the judgment against him and the sale, and to set aside and have declared void the decree of registration.

Kirk had resided with his guardian, his mother, near the defendant M, and the families were intimate. Neither Kirk nor his mother were informed of the proceedings to register title, nor was any summons or notice thereof served upon them except the published notice.

The judgment and execution sale were held void, and the registration of title set aside. The Court held that, as the defendant M had brought the registration action on account of a defect which he knew could be rendered

only by barring Kirk's rights and claims, M should have served summons upon Kirk, whom he knew, and who resided in the neighborhood. (*Kirk v. Mullen*, 197 Pac. 800.)

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### FEDERAL TAX LIENS.

Numerous inquiries have been made about the subject of the article on Federal tax liens on real property appearing in November-December issue of *The Lawyer and Banker*. Some phases of the subject do not appear to have been understood, and in reply to inquiries and comments these further statements are made.

Under our dual system of government certain powers of government are exercised by the Federal government, and other powers by the States. How land may be acquired, conveyed, incumbered, or otherwise dealt with, to whom it shall descend, by whom and in what way devised, etc., are matters within the exclusive legislative control of each State as to land within its boundaries. Each State makes its own laws about recording matters affecting land titles.

What is so commonly spoken of as the "recording system" is a system only in so far as the basic idea underlying it is concerned; the idea of having certain matters recorded by transcription into books kept by certain public officials. It is not a "system" in that it is universally all comprehensive in its scope, requiring or allowing any and every matter affecting titles to land to be recorded. Each State enacts its own laws governing the matter, and in almost every one of them the "recording system" is the result in the aggregate of separate and distinct statutory provisions requiring specific things to be recorded. For example, in a given State one statute defines deeds, and provides for their recordation. Another statute defines mortgages and provides for their recordation. Another statute creates mechanics' liens and provides for their recordation. And another statute governs *lis pendens*, some other statute judgments, and so on. The records created in this manner in detail, make up in the aggregate the recording system from that State. What the statutes of a State do not require or permit to be recorded have no effect by reason of being recorded even if the matter be one affecting title to land. For example, in some States an unacknowledged or defectively acknowledged deed is not entitled to be recorded, and if it be recorded does not thereby operate as constructive notice. Again, where a statute provided for recordation of mortgages but no statutory provision existed for the recordation of assignments of mortgages these were held not entitled to be recorded, and if they were such recordation did not operate to effect constructive notice.

The recording system is not uniform throughout the States. An instrument that is required to be recorded in one State to operate as constructive notice, is not only not required to be in another State under its laws, but may even not be permitted to be recorded, though it affect title to land. For example, an executory contract of sale of land affects the title thereto and in some States is required to be recorded to effect constructive notice, while in other States it is not required or not permitted to be put of record.

With respect to any instrument, therefore, that it is proposed to record in some county office of a State, the question is, Is the instrument one the State statutes require or permit to be recorded and give effect to as constructive notice? The idea, so commonly expressed, that "any-old-thing" can be put of record and everybody must take notice of it because it is recorded is nonsensical.

So a claim of tax lien by the Federal government, just because it is a lien or incumbrance on title to land, may not be recorded in some recording office of a State, unless the State law authorizes it to be. And if it is filed or recorded in such State office, such as that of county recorder or register of deeds, it will not operate in consequence thereof as constructive notice unless the statutes of the State so provide. The Federal government has no power to provide that instruments it may create, such, for example, as a claim of tax lien, shall be recorded by State recording officers. (And county recorders are State officers in the sense of term as here used.) The Federal government can exercise no control over State officers. It can and does create its own system of records and notice.

The fact that some collectors of internal revenue may be filing or recording claims of Federal tax liens in the offices of recorders of counties within their collection districts without State statutory authority to do so, does not and cannot be a basis for absolute reliance upon such records for information of the existence of these liens. It is what the law requires to be done, not what an official voluntarily does, that is to be depended upon. And it must be remembered that a Federal tax lien is a lien on the tax-debtors property though no claim of lien is filed in any office. A notice of a claim of such lien need be filed only to operate as notice as to purchasers, mortgagees, or judgment creditors of the tax-dog, and for that purpose must be filed in the office of the clerk of the Federal district court or, when the State by statute so authorizes, then in the office of the county recorder wherein is situate property of the tax-debtor.

In this connection it is to be noted that the Federal statute gives

a judgment-creditor a status not given by the laws of most of the States.

Any proposal that Federal statutes creating liens on real property be repealed should be opposed. Such a proposal put into effect would weaken the power and strike at the foundation of government. A government that cannot possess means, such as the statute in question affords, to compel payment of taxes would be weak. Useful, constructive work can be done by patriotic State organizations in each State, by securing enactment of statutes in harmony with the provisions of the Federal law, authorizing the filing of these lien claims in the offices of county recording offices, and thereby making these records easily accessible.

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Henry J. Fehrman made an excellent record as president of Title Examiners' Section of the national association, adding forty-one members to it. He deserved the re-election that was given him.

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The Washington Association of Title Men, at its convention, adopted the following resolution, "That it is the sense of this association that we endorse the magazine, "The Lawyer and Banker," under the associate editorship of F. C. Hackman, and that we recommend that the members subscribe for said magazine," and caused a copy of it to be sent to each member of the state association.

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Time, variously applied, is noted as a merit by different companies. The letter-heads of Alameda County Title Insurance Company have thereon, "In business continuously since 1861," and indeed that is a record very few title companies, if any, can equal or surpass. Home Abstract Company notes on its letter-heads, "Twelfth year, same location." Title Guaranty and Trust Company of Chattanooga, in its booklet, says, "This (its) plant was started in 1891—thirty years ago; the greatest asset of a plant of this kind is its age—its accumulated records."

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In Cook County, Illinois, wherein is situate Chicago, there are about 7,500,000 instruments of record, and court cases number about 800,000 in the circuit and superior courts. The field instruments approximate 399,000 in Shelby County (Memphis), Tennessee. In Jefferson County (Louisville), Kentucky, where the records cover a period of over one hundred and forty years, there are about 950 volumes of records of deeds, mortgages, etc., several hundred thousand suits, besides records of wills, tax records, etc.

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#### **SMALL TITLE INSURANCE COMPANIES AUTHORIZED.**

Considerable interest exists on the part of abstracters in the matter of title insurance, and as to whether or not it is practicable and possible for an abstracter possessed of relatively small capital and resources to engage in the business. Quite generally under insurance

codes a deposit of a large sum in value in specified classes of securities is required to be made with some state official as a condition precedent to the conduct of a title insurance business. And this sum is required to be deposited by any and every company,—is of general application throughout the state,—without regard to the fact that a title company, like an abstract company, may desire to conduct a business within the confines of a particular county, and the sum required to be deposited be, in comparison to the possible volume of business, so large as to prohibit engaging therein. The question, therefore, is asked, is there any provision in any code anywhere which makes it possible for a concern with limited resources to conduct a title insurance business? The answer is, Yes. For the enlightenment of those interested in this matter attention is called to the insurance code of the state of Washington. In that state a company is not required to have any specific amount of capital to qualify for insuring titles, but deposits for protection of policy holders must be made with a state officer of specified securities in amounts in value proportioned to the population of the county where the business is to be conducted, or if a general title insurance is to be conducted then in a sum specified therefor. The section of the code covering this matter of deposits is as follows:

“No company shall issue contracts of guaranty or title insurance in this state, under class twelve of section (here a section is referred to defining insurance, class twelve specifically defining title insurance) until and unless it deposit and maintain on deposit through the office of the insurance commissioner, with the state treasurer, a guaranty fund in securities authorized by this act as legal investments for the capital or funds of insurance companies, in amounts as follows:

(a) In counties having a population of five hundred thousand or more as evidenced by the last official census of the United States or of the State of Washington, the guaranty fund shall not be less than two hundred thousand dollars (\$200,000.00); (b) In counties having a population of not less than three hundred thousand nor more than five hundred thousand as evidenced by said census, the guaranty fund shall not be less than one hundred and fifty thousand dollars (\$150,000.00); (c), in counties having a population of not less than one hundred and fifty thousand nor more than three hundred thousand, as evidenced by said census, the guaranty fund shall not be less than one hundred thousand dollars (\$100,000.00); (d) In counties having a population of not less than one hundred thousand nor more than one hundred and fifty thousand, as evidenced

by said census, the guaranty fund shall not be less than seventy-five thousand dollars (\$75,000.00); (e) In counties having a population of not less than sixty thousand nor more than one hundred thousand, as evidenced by said census, the guaranty fund shall be not less than fifty thousand dollars (\$50,000.00); (f) In counties having a population of not less than thirty-five thousand nor more than sixty thousand as evidenced by said census, the guaranty fund shall not be less than twenty-five thousand dollars; (g) In counties having a population of not less than fifteen thousand nor more than thirty-five thousand, as evidenced by said census, the guaranty fund shall be not less than fifteen thousand dollars (\$15,000.00); And in counties having a population of less than fifteen thousand, as evidenced by said census, the guaranty fund shall be not less than ten thousand dollars (\$10,000.00). Any company authorized to issue contracts of guaranty, or title insurance in any county of this state shall be permitted and authorized to issue contracts of guaranty and title insurance in one or more other counties of this state: Provided, its guaranty fund on deposit with the state treasurer is equal to the maximum amount hereinbefore required of a company issuing contracts of guaranty or title insurance in any of such counties: Provided, further, If any company shall have complied or shall thereafter comply with the provisions of this act for the county in which it has its principal place of business no other company authorized to issue contracts of guaranty or title insurance in any other county of this state shall be permitted to issue contracts of guaranty or title insurance therein after the expiration of its certificate (see note below) then held unless it has deposited or shall thereafter deposit with the state treasurer through the office of the insurance commissioner securities in addition to those then required of such company in the same amount as required for such county: Provided, further, That when any company authorized to issue contracts of guaranty or title insurance in any county of the state shall have and maintain on deposit with the state treasurer a guaranty fund in securities authorized by this act in the total amount of two hundred thousand dollars (\$200,000.00), such company shall be permitted and authorized to issue contracts of guaranty and title insurance in all of the counties of this state: Provided, further, That nothing herein contained shall prevent any company authorized to issue contracts of guaranty or title insurance in any county of this state from underwriting or reinsuring in whole or in part contracts of guaranty or title insurance by any other company. The provisions of this act shall in no wise

be interpreted to apply to persons, copartnerships, or corporations engaged in the business of preparing and issuing abstracts of, but not guaranteeing or insuring, title to property and certifying to the correctness thereof." Sec. 2991, subd. 4-a, Pierce's Code, 1921, Washington.

NOTE. A company is required to obtain from the insurance commissioner a certificate of authority to do business, which expires on the first of April next after date of its issue, and must be renewed yearly.

.. Concerning the above requirements an interesting question arose. The insurance commissioner of the State of Washington sought to cancel the license of a domestic title insurance company because it insured titles to real property out of the state, holding the company not authorized so to do under the laws of the state. On appeal in this case the Supreme Court of that state made the following observation with respect to the above quoted section:

"The appellant (insurance commissioner) argues that the fact that deposits are to be made in the various counties according to population is conclusive that it was not the intention of the act to allow the company by making small deposits in one of the smaller counties, to be then entitled to engage in a large business of insurance on titles without the state. This argument is not persuasive, for the reason that the law provides that, by making a deposit in any county, the company may write insurance in other counties of the state, and further provides that the companies may underwrite or reinsure contracts of other companies; thus clearly indicating that it was not the intention that the small guarantee fund was to be security for all the business which the company might engage in under that guarantee. It is to be presumed that, when a domestic insurance company goes into a foreign state and writes insurance on property in that state, the laws of such foreign state will be ample to protect the policy holders there. It must also be presumed that the legislative intent was that, upon policies written within the State on property outside the state, such policy holders were to look to the general assets of the company for the satisfaction of their claims, and not to the specific deposits made for the protection of the title to property within the state." And the Court held that the deposits required by the state law are security for liabilities arising from insurance of property within the state, but not for liabilities arising from policies of a domestic company whether written within or without the state which cover property of the state, but that such policy holders must look to the general assets of the company for satisfaction of their claims. And the Court said: "This is in harmony with the



provisions relating to the amount of the deposits in the various counties, the relation of the deposit to the population of the county being an indication that the legislature recognized that the value of the property insured in the various counties would bear direct relation to the population thereof." (Northwestern Title Ins. Co. v. Fishback, 110 Wash. 350, 188 Pac. 469.)

The above quoted section allows, as will be observed, a company making a deposit to do business in a particular county, to insure titles to property in any other county, where there is no title insurance company, for which the required deposit is equal to or less than that made by such company to do business in its home county. And a company may do a general title insurance throughout all counties upon deposit of the maximum amount of \$200,000.00, whether or not there is a local title insurance company in any county in which it may insure titles.

Every title insurance company is required by a provision of the insurance code to "own and maintain a complete set of tract indexes of the county in which its principal office within the state is located." (Laws 1911, p. 271, sec. 197; Rem. 1915 Code, sec. 6059-197.) A company is not required to have or own tract indexes to property in other counties though it insure titles to property therein. For the insurance of titles to property in other than their respective home counties the title companies require and depend upon abstracts made by abstracters within such counties. The meaning of "tract indexes" is not given in the code. It may here be remarked it has no exact significance. What are called "tract indexes" in common use by abstracters vary a great deal in form, and particularly vary as to what records indexed to land. Thus a "tract index" may comprise index entries to real property descriptions of all recorded matters, and court proceedings, county commissioner's records, assessments, and other items; or a "tract index" may consist of entries of recorded instruments that are found in the recorder's or register's office only.

Soon after the insurance code was adopted a company was organized to insure titles in a county in the state for which the required deposit is \$10,000.00. It has been successfully doing business ever since, and has pursued what may be said to be, a liberal policy in assuming all reasonable risks in titles accepted for insurance.

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It is said of Paul D. Jones of the Guaranty Title and Trust Company, Cleveland, Ohio, that he knows more people by name than any man in his city. He may well be supposed to, for he is a real humanitarian. He has built up a splendid organization in the company he directs.

## AMONG THE ABSTRACTERS AND TITLE MEN

Some men, after they have achieved high executive position with a corporation, relax in industry and in interest in the business of the corporation. Other men continue to be as industrious as before, and even more so, if possible. These take keen interest, and find pleasure, in the despatch of business, in the accomplishment of results. Such men are leaders. They secure the good-will and co-operation of employee. Of men of this latter class holding high executive positions in the title business, one is A. R. Marriott, vice-president of Chicago Title and Trust Company, the executive head of the abstract department. No one man supervises so large a volume of abstract business as Mr. Marriott. He is an indefatigable worker, and is frequently in his office at work long after hours and on non-business days.

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Almin L. Swanson, president and manager of Tacoma Title Company, Tacoma, Washington, has been appointed chairman of the Executive Committee of the Washington Association of Title Men. Mr. Swanson is active in public affairs, has an extensive acquaintance, and is one of the public school directors of his city.

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N. H. Gillot, manager and one of the directors of Pioneer Abstract and Guarantee Title Company, El Paso, Texas, is by profession a civil engineer. He was educated in Europe, graduating from a university there. Coming to this country in early manhood, he went West, following his profession as a civil engineer, at a time when that section was "wild and woolly", and afforded him many adventures. He finally bought an abstract business, and has developed the present large company he manages.

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Jessie P. Crump, president of Kansas City Title and Trust Company, is a direct descendant of that stalwart and famous Kentuckian, Daniel Boone. Reserved, dignified, conscientious, Mr. Crump is representative of a splendid type of our distinctive American citizenry. Anent Daniel Boone, Washington Irving in his work "Astoria", chapter 15, tells of Hunt meeting Boone on the Missouri in 1810; that Boone then eighty-five years old had but then recently returned from a trapping expedition with "nearly sixty beaver skins as trophies." Also that he died in 1818, at the age of ninety-two.

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Glen M. Schaefer, vice-president and manager of Security Title Insurance and Guarantee Company, Riverside, California, is a firm believer in advertising his business, and his belief is supported by the unusual success he has had. He can well be regarded as an authority on the matter of title advertising.

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The spirit Lewis D. Fox of Fort Worth, Texas, puts into his business and into matters of interest to abstracters deserves attention, and is commendable. He is energetic and liberal of his time and money in advancing any measure advantageous to the title business generally, and displays a rare spirit in being generous in appreciation of the efforts of others. He donated a silver trophy to be awarded the abstracter exhibiting the best abstract at the convention of the abstracters' association in his state.

**FLORIDA STATUTORY TITLE PROVISIONS.**

In Florida trust companies are authorized to insure titles to land. There five or more persons may organize a trust company with capital of not less than \$50,000, and have authority, with other powers, "to examine, make and certify abstracts of title, and to make insurance of every kind pertaining to or connected with titles to real estate, and to make, execute, and perfect such and so many contracts, agreements, policies and other instruments as may be required therefor; provided, such powers and purposes are enumerated in the charter; provided, further, that in order to exercise the extra powers conferred and to cover extra liabilities of companies operating under this article, said companies shall deposit with the State Treasurer, an additional security of ten thousand dollars in cash or mortgages, deeds of trust of real estate, or United States, State, county or municipal bonds, or a surety bond by any company licensed to do business in this state, all of which security shall be approved and kept by the State Treasurer in trust for said company, and for which he shall give his official receipt, embracing a full and complete list of such securities and the values of the same at the time received, said securities shall be held subject to the payment of any judgment or decree which may be rendered against said company, on account of the privileges herein granted; Provided, further, That the charges made by said company for making abstracts shall not exceed the current prices charged by other firms, corporations or individuals for like service". Rev. Genl. Stat. Florida, 1920, secs. 4183, 4185-14.

A peculiar provision of Florida law is one relating to the replacement of destroyed records. When any records or any material part thereof, in any county, concerning title to property are destroyed by fire or other causes, so that a connected chain of title cannot be taken therefrom, and any abstracts, copies, minutes, extracts, maps or plats be found, fairly made before such destruction of the records, by "any person or persons in the ordinary course of business, and they contain a material and substantial part of such records", an action can be brought to condemn and appropriate such records. However, if the defendant in such a suit offers to furnish copies they are to be accepted. Rev. Genl. Stat. Florida, 1920, secs. 3854 to 3863.

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**ODDS AND ENDS.**

Under Mexican law marriage is the lawful partnership of one man and one woman united in indissoluble bonds in order to perpetuate their species and to assist each other to bear the burden of life. The law does not recognize future espousals, nor any conditions contrary to the essential purposes of marriage. Marriage must be celebrated before the officials and with all the formalities prescribed by law. Compendium of Laws Mexico, Wheless, vol. 1, sec. 170.

In Brazil heads of families are permitted to select an estate as the domicile of the family, exempt from execution for debts, except taxes upon the estate. The exemption continues so long as the married couple live and until the children attain their majority. In order to claim this homestead exemption the claimants must have no debts the payment of which may be prejudiced thereby. The exemption is from debts arising subsequent to the selection, and not those previously existing if they become uncol-

lectible by reason of the homestead claim. The estate cannot be put to any other use or be alienated without the consent of the interested persons or their legal representatives. The homestead claim must be made by notarial act and transcribed in the register of real property, and published in the local press, or, in lieu thereof, in the press at the capital of the State. Civil Code Brazil, Wheless.

In Georgia, upon the death of the husband without lineal descendants, the wife is his sole heir, and upon payment of his debts, if any, may take possession of his estate, without administration. The object of this statute is to save her the expense of administration merely for the purpose of collecting the estate and delivering it to her. Park's Code, 1914, sec. 3931; *Demmons v. Booker*, 128 Ga. 83, 57 S. E. 108.

The insurance code of Texas, according to Texas Statutes, 1920, sec. 4942 a, sub. j, provides that companies may be organized "to insure against loss or damage on account of circumstances upon or defects in the title to real estate." "Circumstances upon" titles to real estate is a new term calling for explanation.

One or more of four words form part of the name of almost all companies engaged in the title business. The four words are abstract, title, guarantee, also spelled guaranty, and insurance. The name of the city or county where a company conducts its business is highly favored for the first word of the company's name. When the name of the city is selected the word "City" is seldom used, except it actually be a part of the name of the city, as in the case of Kansas City. On the other hand, when the name of the county is chosen the word "County" is also very frequently adopted as part of the corporate name, as Jones County Abstract Company, Jefferson County Abstract Company. The words "Security" or "Pioneer" as first word of a name have some popularity, as in Security Abstract Company, Pioneer Title Company. Though the title business is based upon records, the word "Record" is rarely used. Only one company appears to have the name Record Title Company. In using the word "Guarantee" or "Guaranty" with the word "Abstract," the former is preferred as the first word, as in Guarantee Abstract Company; but when used in connection with the word "Title," it follows this word, as in Title Guarantee Company, in almost all cases.

One who makes briefs, abridgements or epitomes is an abstractor or an abstractor, and either spelling of this word is correct. In either spelling of it the accent falls upon the second syllable; thus ab-abstract'er, ab-strac'tor. It is derived from the Latin word "abstructus," meaning to draw from, to separate. An abstractor is not necessarily one who makes abstracts of records of land titles, but owing to the general use of abstracts of title and specialization in making these, the word appears to have that meaning only in common usage and understanding of it.

In Wyoming no person, company or corporation may make or furnish abstracts of title to real estate within the State, "without first having a full and complete set of abstract records of title of all the real estate situated in the county in which such business is to be carried on; or, in case such abstract business is limited to furnishing abstracts of real estate situated

in an incorporated city or town, in such cases a complete set of abstracts of all real estate in such city or town shall be kept." An abstractor is also required to "enter into a bond to the people of the State of Wyoming for the use of any person who shall sustain loss or damage by reason of the failure of any such person, company or corporation in the performance of his or their duty as such abstractor," in the sum of ten thousand dollars, with sufficient sureties, to be approved by and filed with the county clerk, and conditioned for faithful performance of his or their duty as an abstractor. The carrying on or attempt to carry on an abstract business without compliance with the statute draws a fine of five hundred dollars for each and every offense. Wyoming Comp. St., 1920, secs. 4354, 4355.

#### **TITLE COMPANIES MERGE.**

The Santa Barbara Abstract and Guaranty Company of Santa Barbara County, California, has merged with the Title Insurance Company of Riverside, in that state, the new corporation resulting having the name Security Title Insurance and Guarantee Company. With its allied companies, the new corporation has combined assets of more than \$400,000, of which \$100,000 is on deposit with the Treasurer of the State of California under the provisions of the insurance code. William S. Porter, president of the Santa Barbara Abstract and Guaranty Company, is vice-president and a director of the new company, and manager of the Santa Barbara office, with W. L. Gilliland, as assistant. George S. Edwards, chairman of the board of directors of Commercial Trust and Savings Bank of Santa Barbara, is treasurer of the new company; J. M. Warren, president of County National Bank and Trust Company, will act in an advisory capacity; and Messrs. Richards, Heaney, and Price are its counsel. Harry C. Cree, for nearly a decade Riverside's City Clerk, was added to the personnel of the Riverside office as escrow officer, which otherwise remains unchanged.

#### **TITLE LAW BREVITIES.**

A decree of distribution does not originate a title, but operates to release the title vested in the heir on the death of the ancestor from the conditions of administration to which it was subject, and furnishes the heir with legal evidence to establish his title. *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370.

A general statute providing for judgment liens is primarily intended to give statutory security for and to secure payment of judgment debts, and the lien created is a vested legal right. A judgment lien does not arise by virtue of the judgment, but from the statute creating it, under which it must stand or fall. *Beatty v. Cook*, 185 N. W. 360.

The word "heirs" both in its ordinary and technical signification, denotes those who take a person's real estate by inheritance upon his death. When the word is used in wills it is construed as having this meaning unless the context and the circumstances under which it was employed indicate a different signification. So the heirs of a decedent include his widow as well as his next of kin by blood, where the widow is a statutory heir, and thus a legal heir as well as his kindred of blood. And where a testator by his will makes bequests to blood relatives, to children of kindred, and to

strangers of the blood, there is thereby shown no intent that the word "heirs" used in the will should exclude the widow of a deceased beneficiary, under a bequest to his heirs. *Sherburne v. Howland*, 132 N. E. 188. Also in *Davis v. Davis*, 185 N. W. 442, held a widow an heir of her deceased husband where she would take an estate or interest under the statutes of descent.

Although the provisions of the statutes determining who are heirs at law have been changed subsequent to the date of the will of a decedent and of admission of his will to probate, nevertheless the statute in force at the time the words of the will become operative in fixing the ultimate beneficiaries will control, unless a contrary intent is manifest from the will as a whole. So where a testator made a contingent remainder, which should vest upon the death of several life tenants, payable to the heirs of each, it must be presumed he intended his beneficiaries should be the heirs as fixed by the law at the time the death of the life tenant occurred. *Sherburne v. Howland*, 132 N. E. 188.

An abstract is an epitome of the record evidence of the title. A title appearing from the records as clear is more desirable and renders the property more saleable, and therefore more valuable, than is property the title to which rests in parol. Accordingly a contract calling for "an abstract showing a merchantable fee-simple title" is not complied with by furnishing an abstract which shows the record title defective accompanied with affidavit showing adverse possession of the property for the statutory period by the vendor, or some predecessor in title under whom he claims. *Barclay v. Bank of Osceola County*, 89 So. 357.

Where a husband and wife execute deeds to each other with the understanding that on the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect, the transaction is wholly ineffective. *Miller v. Brode*, 199 Pac. 531. Same principle sustained in *Eves v. Roberts*, 96 Wash. 90, 164 Pac. 915.

#### IMPORTANT TAX DECISION.

Joint Stock Land Banks will be affected by the decision of the Supreme Court of Alabama to the same extent as Federal Land Banks. The Alabama decision stops the organization of more of these banks and will cause a change in the operation of all banks operated under the rural credit system.

The Supreme Court sustains the new Alabama law requiring the payment of a recording tax of fifteen cents per hundred dollars on all mortgages recorded. The Federal Land Bank of New Orleans several months ago refused to pay the recording tax on the ground that its mortgages were exempt from taxation under Federal statute, when Probate Judge Crosland of Montgomery county demanded the fee. After several months of litigation, the Supreme Court decided the test case in favor of the state and the Federal Land Bank is directed to pay the fees. The court holds that the tax is not an ad valorem tax, but a privilege tax. There is no law requiring the Land Banks to record their mortgages. The state of Alabama affords an opportunity for recording and it imposes a tax for the privilege and protection thus furnished to the parties owning mortgages. The law is uniform in its application. The law imposes no tax on the mortgage unless the holder exercises his option to have it recorded. Payment for this privilege must be made as provided by the State Law.

The Supreme Court of Alabama has a high reputation for ability.

The decision written by Chief Justice Anderson is conclusive and in harmony with a long list of decision of the United States supreme court. In all probability the Alabama decision will be affirmed at Washington.

Federal authorities have held that revenue stamps are not required on Federal Land Bank mortgages, but that is a special exemption from a general requirement like the exemption of their interest from Federal Income Tax. There is nothing in these decisions to conflict with the Alabama decision.

The Supreme Court of Alabama has shown the way to remove a part of the unfair discrimination against local investors which has caused much dissatisfaction everywhere since the special subsidy of tax exemption of Land Bank Bonds and mortgages has been in effect.

Minnesota and several other states have recording tax laws, but in none except Alabama has the right of exemption been tested in the courts.

# DAMAGES FROM UNLAWFUL SALE OF LIQUOR

By E. N. Zoline of the New York Bar.

The sale of alcoholic liquors above a certain per cent is prohibited. If a sale be made in violation of the Volstead Act and the purchaser be injured thereby is he liable in damages to the injured party. Of course in such a case the seller is guilty of lese majeste and violation of the Volstead law, but is he also guilty of criminal homicide? It has often been said in general terms that one who does an unlawful act is guilty of manslaughter if death results proximately therefrom. It is, however, well established that a person who does an act which is *malum prohibitum* only is not liable for an unintentional death resulting therefrom as an unforeseen consequence if the act is not of itself dangerous to human life. "If an act not unlawful in itself, as shooting at game, be prohibited to be done unless by persons of a certain description, the case of a person not coming under that description offending against such statute and in so doing unfortunately killing another will fall under the same rule as that of a qualified man and must equally be attributed to misadventure" (1 *East P. C.* 260). Almost the exact case postulated by Mr. East arose in *State v. Horton* (139 *N. C.* 588, 51 *S. E.*, 945, 111 *A. S. R.*, 818, 4 *Ann. Cas.*, 797, 1 *L. R. A. N. S.*, 991). In that case one trespassing on lands of another for the purpose of hunting turkeys, in violation of a statute, accidentally killed a fellow hunter. It was held that he was not guilty of manslaughter. The same principle was illustrated in *Estell v. State* (51 *N. J. L.*, 182, 17 *Atl.*, 118), wherein it appeared that the accused while driving a team rapidly past a tollgate in the effort to evade payment of toll accidentally killed the gate keeper, who caught at the horses in an attempt to stop them and was run over. The court said: "It is evident that the legal theory on which the case has been tried is that the defendant was chargeable with the death which ensued by reason of the single fact of his having attempted to pass through the tollgate without paying his toll; the act being unlawful, it was not necessary that it should appear that it was done in a careless or dangerous manner; nor did it affect this responsibility if the deceased, by his own carelessness, frightened the team, thus producing the fatal result. This was a plain misstatement of the legal principle. The act of the defendant in making this attempt, in the exercise of due care, was, at its worst, merely *malum prohibitum*, and was in itself devoid of dangerous tendency, and therefore was not criminal. The mere unlawfulness of the act does not, in this class of cases, per se, render the doer of it liable, in criminal law, for all the undesigned and improbable consequences of it."

This rule would seem clearly to exclude the idea that death resulting from the sale of intoxicating liquor is criminal homicide merely because the sale is in violation of law. Even those who hold most strongly to the belief that alcohol is a poison will admit that it is a very slow poison and that the taking of a drink or even several drinks is not an act imminently dangerous to life. If any one doubts it he need but compare the robust civilization of the Anglo-Saxon, whose bibulous habits run, as has been recently said, "from Hengist and Horsa to Haig and Haig", with that which cen-



turies of total abstinence have produced in Moslem lands. The few cases which have passed on the question are quite thoroughly in accord. In *State v. Rettze* (86 N. J. L., 407, 92 Atl., 576) the accused, an innkeeper, was convicted of manslaughter on proof that in violation of law he sold liquor to a man who was visibly intoxicated, and that in leaving the premises the drunken man fell and fractured his spine. The court said: "We do not think that criminal liability on the part of the defendant for the death of Welsh can be predicated upon these facts. It is asserted by counsel for the state that, because the legislature has prohibited the further sale of liquor to a man who is already visibly under its influence, under pain of forfeiture of the vendor's license (*Comp. Stat.*, p. 2907, sec. 83), an innkeeper who violates this prohibition and so renders his customer less able to stand securely is legally chargeable with manslaughter if the customer by reason of his intoxication falls and in his fall receives injuries from which he dies. We cannot agree to this proposition. The fact that a drunken man is more likely to fall than a sober one must be admitted, but that sudden death is the usual or even the probable result of overindulgence in intoxicating beverages must be denied. Common experience is to the contrary. If it shall ever become so, then excess in the use of strong drink will largely cease or a very great increase in the death rate may be naturally expected. It is only for the natural and probable result of a wrongful act that a wrongdoer is liable, even civilly. And this is so, at least so far as criminal responsibility is concerned, even if the act is prohibited by the legislature, provided it be merely *malum prohibitum* and not *malum in se* and is not dangerous in itself."

In *Thiede v. State* (Neb. 182 N. W., 570) it was shown that the accused shared with a neighbor some "home brew" which resulted fatally. The court said: "It is our opinion that the giving or furnishing of intoxicating liquors unaccompanied by any negligent conduct, though unlawful, is but an act merely *malum prohibitum*. The person who treats his friend, even though the act be unlawful, has no intent to harm, nor is such an act calculated or intended to endanger the recipient of the liquor. We cannot go so far as to say that such an act, prompted perhaps by the spirit of good fellowship, though prohibited by law, could ever, by any resulting consequence, be converted into the crime of manslaughter."

So in *State v. De Fonti* (34 R. I., 51, 82 Atl., 722) it was held that an unlawful sale of whiskey containing wood alcohol whereby the death of the buyer was caused did not render the seller guilty of manslaughter unless he knew that the whiskey was poisonous or was negligent in being ignorant thereof.

The one decision of a contrary tendency is *State v. Keever* (177 N. C., 114, 97 S. E., 727). In that case it appeared that 38 per cent. of wood alcohol was added to soda water and the concoction sold by the accused, causing the death of a consumer. The court said: "If the defendant put wood alcohol in the liquid to produce intoxication, with knowledge of its poisonous quality, and proceeded to sell such decoction, he was engaged in an unlawful as well as a recklessness business, and if death ensued because of such poison he is guilty of manslaughter. The sale of intoxicating liquor is now banned and condemned by the laws of the nation and most of the states, including North Carolina. To sell it is not only *malum in se*, but *malum prohibitum*. When the defendant sold this liquid to the deceased he was engaged in an unlaw-

ful act, and if the deceased died in consequence of the poison put in it by defendant, although innocent of any purpose to kill, he is guilty of manslaughter." In that case the decision seems to have been largely controlled by the fact that the accused knew or should have known that the wood alcohol had been added to the soda, the court saying elsewhere in the opinion that if he had proved ignorance thereof it would have exculpated him, so that the Keever case, despite the dictum quoted, does not run counter to the authorities heretofore discussed.

But since the doctrine which has been considered is based wholly on the fact that death is an unforeseen consequence of an act not in itself dangerous to human life, it follows that if the person selling liquor is in any manner charged with notice, of its deadly character he is responsible for death resulting from its consumption. Thus it was said in *People v. De Fonti* (*supra*): "We are of the opinion that the second count in each indictment is sufficient. The accused is here charged with negligently substituting wood alcohol, deadly poison, for whiskey which was ordered and paid for. Either the accused knew that he was delivering wood alcohol, a deadly poison, in place of whiskey, or he negligently represented the liquid so delivered to be whiskey without having any knowledge whether it was or was not the whiskey which had been called for. So acting in either event he must be held liable for the consequences of his act if it be proved at the trial."

In *Thiede v. State* (*supra*) it appeared that the accused knew that persons previously drinking the "home brew" in question had suffered ill results from it. On this point the court said: "Where the liquor, by reason of its extreme potency or poisonous ingredients, is dangerous to use as an intoxicating beverage, where the drinking of it is capable of producing direct physical injury, other than as an ordinary intoxicant, and of perhaps endangering life itself, the case is different, and the question of negligence enters, for if the party furnishing the liquor knows, or was apprised of such facts he should have known, of the danger, there then appears from his act a recklessness which is indifferent to results. Such recklessness in the furnishing of intoxicating liquors in violation of law may constitute such an unlawful act as if it results in causing death, will constitute manslaughter. The evidence here was sufficient, as we view it, to warrant a submission of the charge of manslaughter to the jury. The defendant, it seems, distilled this liquor himself. It was at least home made whiskey. The danger of drinking such liquor, by reason of its extreme potency and its frequently containing poisonous ingredients, is commonly known. The defendant may have been dealing with an unknown quantity, but, as was said in the Keever case, he was handling a dangerous weapon. There is evidence to show that he knew this particular liquor was extremely powerful. He saw its effect on Chris Nelson and on Stromer in the morning, yet that evening he offered it to the Prosser boys and invited them to drink all they wanted. There is substantial proof that the liquor was dangerous. That two drinks of it should paralyze three men within a few minutes after drinking, and that one of these men as a result should die in a few hours, as happened in this case, sufficiently raised the issue of its dangerous character for the jury."

Another case clearly illustrating the distinction between the violation of a prohibition designed specifically to protect life and one designed for another purpose is *State v. Takano* (94 Wash., 119, 162 Pac., 35). A con-

fiction of manslaughter was sustained in that case on proof that the accused, a druggist, sold wood alcohol without labeling it in the manner required by law.

In this state of the law there arises a question which has never been passed on and which may well be controlling in any case now arising of death resulting from intoxicants illegally sold. The rule that there is no liability for a death thus caused rests on the fact that the drinking of intoxicating liquor is not an act dangerous to life. How far have conditions arising since the Eighteenth Amendment changed the fact in that respect? That some of the liquor illicitly sold is dangerous and that careful men will no longer drink without some inquiry as to the character of the liquor or some knowledge of the person offering it is well known. There probably is not a man engaged in the illicit sale of liquor who does not know that there is impure and poisonous liquor extant. In a common or colloquial sense it is a dangerous act today to drink liquor obtained from unknown and illicit sources. Is it so in a legal sense also, or at least a question of fact for the jury, in view of the notoriety of the instances of death from wood alcohol? On the other hand, the proportion of liquor now illegally sold which is dangerous is exceedingly small. Incalculable quantities have been consumed in the last year, and the *deaths have been very few.. Analysis of large quantities seized in the cities* is said to show much that is new or diluted, but very little that is dangerous. It is probably no exaggeration to say that not one bottle in ten thousand of the liquor sold in the past year was actually dangerous to life. Can an act which produces death once in ten thousand times be said to be dangerous? The instances of drunken men who have met with fatal accidents by reason of their intoxication are fully as frequent, as a review of cases under the civil damage acts will show. But that peril was said in *State v. Reitze (supra)* to be too remote to make an illegal sale to a drunken man an act dangerous to life, and no stricter rule should apply by reason of the occasional and sporadic instances of poisoning by wood alcohol. There is a possible intermediate view which has something of logic and public convenience to commend it, viz., to cast on the seller of intoxicants the burden of showing that he made reasonable and diligent inquiry into the antecedents and quality of the liquor before offering it for sale, exonerating him if such inquiry is shown. Small as is the proportion of dangerous liquor on the market, sufficient publicity has been given to its existence so that it may well be that one purchasing through "underground" channels for resale is guilty of negligence if he makes no inquiry. If inquiry is necessary the illegality of the entire transaction would be sufficient to cast on him the burden of showing that it was made. As was said in the Keever case (*supra*): "There was no way by which the state could well prove directly that the defendant knew that there was wood alcohol in the liquid. Therefore where it proved the actual killing by the poison supplied by defendant, he must show mitigation or excuse." Such a rule would apparently safeguard the accused from conviction of one offense merely because he has committed another, and at the same time would render liable for criminal homicide the man who, thinking only of his own profits, ministers to the needs of the victims of Volsteadism with reckless indifference to the quality of the liquor which he sells.

# INTERESTING WILLS

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The following is the will of the late Chief Justice White. It is remarkable for its conciseness:

"This is my last will. I give, bequeath and devise to my wife, Leita M. White, in complete and perfect ownership all my right and property of every claim and nature, whether real, personal or mixed, wherever situated, appointing her executrix of my estate, without bond and giving her seisin thereof."

## THE OLDEST WILL

The oldest known will in the world was executed in 2548 B. C. It is the "Will of Uah" and was translated from the original by F. L. L. Griffith, M. A. F. A., reader in Egyptology, University of Oxford. This will was written on papyrus, executed in the presence of three witness and sealed with the impression of a scarab, scroll pattern. It was unearthed by Dr. Flinders Petrie at Kahun, Egypt, and is now the property of the museum attached to the London University. The translation of the will reads as follows:

### "WILL OF UAH"

AMENEMHAT IV, YEAR 2, MONTH POAPHI, DAY 18

"I, Uah, am giving a title to property to my wife, Sheftu, the woman of Gesab, who is called Teta, the daughter of Sat Sepdu, of all things given to me by my brother Ank-rem. She shall give it to any she desires of her children she bears me.

"I am giving to her the eastern slaves, 4 persons, that my brother Ank-ren gave me. She shall give them to whomsoever she will of her children.

"As to my tomb, let me be buried in it with my wife alone.

"Moreover as to the house built for me by my brother Ank-ren my wife shall dwell therein without allowing her to be put forth on the ground by any person.

"It is the Deputy Gebu who shall act as guardain of my son.

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## UNUSUAL CONDITIONS

Among a number of interesting wills recently brought to light, is one which was uncovered in the Middle West. A man who for some years had been an inmate in a home for aged persons died, leaving a will which placed the bulk of his estate in trust with a local trust company. The income from the estate under the will was to be turned over to the home for the aged in which the man died until the second coming of Christ when the trust should terminate and the corpus of the estate be used to defray the expenses of the Saviour's second visit to the earth. This trust has been accepted and the estate is being administered by the company.

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## A MORMON WILL

Joseph Smith, a Mormon Elder, distributed his property as follows: "To Jane, my beloved wife, during her life time, then the residue to my daughter Emma for her use and that of the rest of my children according as Emma may decide is best."

The names of the other children were noted as well as a description of the property.

"The children of Emma may inherit from her but the children of my other sons and daughters shall not inherit."

The will was contested and set aside as being against good conscience.

### TWO SIDES TO LIFE.

When James II was exiled to France, he was followed by the loyal Earl of Stafford. Shortly afterward, the Earl became infatuated with the daughter of the Duc de Grammont, and married her.

The marriage was an externally unfortunate one. The Earl, a decent man, was constantly humiliated by his wife's escapades. Her disgraceful carrying-on really hastened his death, and in his will, he paid his respects to her and to her parents as follows:

"To the worst of women, Claude Charlotte de Grammont, unfortunately my wife, guilty as she is of all crimes, I leave five-and-forty brass halfpence which will buy a pullet for her supper. A better gift than her father can make her; for I have known when, having not the money, neither had he the credit for such a purchase; he being the worst of men, and his wife the worst of women, in all debaucheries. Had I known their characters I would never have married their daughter, and made myself unhappy."

### THE WILL OF MARY WASHINGTON.

In the name of God, Amen, I, Mary Washington, of Fredericksburg, in the County of Spotsylvania, being in good health, but calling to mind the uncertainty of this life, and willing to dispose of what remains of my worldly estate, do make and publish this, my last will, recommending my soul into the hands of my Creator, hoping for a remission of my sins through the merits and mediation of Jesus Christ, the Saviour of mankind. I dispose of my worldly estate as follows:

Imprimis—I give to my son, General George Washington, all my land in Accokeek Run, in the County of Stafford, and also my negro boy George, to him to his heirs forever. Also my best bed, bedstead, and Virginia cloth curtains (the same that stands in my best bedroom), my quilted blue and white quilt and my best dressing glass.

Item—I give and devise to my son, Charles Washington, my negro man Tom, to him and to his assigns forever.

Item—I give and devise to my daughter Bettie Lewis, my phaeton and my bay horse.

Item—I give and devise to my daughter-in-law, Hannah Washington, my purple cloth cloak lined with shag.

Item—I give and devise to my grandson, Corbin Washington my negress old Bet, my riding chair, and two black horses, to him and his assigns forever.

Item—I give and devise to my grandson, Fielding Lewis, my negro man, Frederick, to him and his assigns forever, also eight silver table-spoons, half of my crockery-ware and the blue and white tea china, with bookcase, oval table, one bedstead, one pair sheets, one pair blankets and white cotton counterpane, half my pewter and one-half of my kitchen furniture.

Item—I give and devise to my grandson, Lawrence Lewis, my negress Lydia, to him and his assigns forever.

Item—I give and devise to my granddaughter Bettie Carter, my

negro woman, little Bet, and her future increase, to her and her assigns forever. Also my largest looking glass, my walnut writing desk and drawers, a square dining room table, one bed, bedstead, bolster one pillow, one blanket and pair sheets, white Virginia cloth counterpanes and purple curtains, my red and white tea china, teaspoons, and the other half of my pewter and crockery-ware, and the remainder of my iron kitchen furniture.

Item—I give and devise to my grandson, George Washington, my next best glass, one bed, bedstead, bolster, one pillow, one pair sheets, one blanket and counterpane.

Item—I devise all my wearing apparel to be equally divided between my granddaughters, Bettie Carter, Fannie Ball, and Millie Washington, but should my daughter, Betty Lewis, fancy one or two articles, she is to have them before a division thereof.

Lastly, I nominate and appoint my said son, George Washington, executor of this, my will, and as I owe few or no debts, I direct my Executor to give no security or appraise my estate, but desire the same may be allotted to my devisees with as little trouble and delay as may be, desiring their acceptance thereof as all the token I now have to give them of my love for them.

In witness thereof, I have hereunto set my hand and seal the 20th day of May, 1788.

MARY WASHINGTON,

Witness, John Ferneyhough.

Signed, sealed and published in the presence of the said Mary Washington and at her desire.

Jno. Mercer.  
Joseph Walker.

# BOOK REVIEWS

**FEDERAL INCOME TAX LAWS**, By Walter E. Barton, Attorney at Law and Federal Tax Consultant, and Carroll W. Browning, Senior Cost Accountant, United States Navy Department, Members of the Bar of the District of Columbia, xxiv, 450 pp. John Byrne & Co., Washington, D. C. Price \$10.00.

It did not require a wise man to invent the axiom that “\* \* And taxes are always with us.” It is one of the vexatious problems of life, and at no time have business men, lawyers and accountants who have to do with the problems involved in Federal Income Taxation been more troubled than now, and in view of the fact that in all probability the question of Federal Income Taxation will be with us for an indefinite period, it behooves us to familiarize ourselves with these laws as well as with the court decisions interpreting the same. The extremely high rates of taxes would be sufficient goad to compel the business man and lawyer to keep themselves very well informed on this subject and at the same time justify them in seeking the strictest possible construction in favor of the taxpayer to the end that the taxpayer will only carry his own part of this heavy burden. One of the difficulties encountered heretofore has been the necessity of searching through a large number of books in order to ascertain the language of the several laws and the court interpretations of same. To all who have had, or will have, that difficult task, the Barton and Browning book will prove invaluable.

This book contains all Federal Income Tax Laws, beginning with the Act of August 5, 1861 and ending with this last Act approved by the President November 23, 1921. Part I contains the Acts of 1909, 1913, 1916, 1917, 1918 and 1921. Part II includes the Acts of 1861, 1862, 1863, 1864, 1865, 1866 (two), 1867 and 1870. All of those in Part II are inheritance of the Civil War. It also contains the Act of 1894 which was declared unconstitutional by the Supreme Court of the United States. Part III contains a number of miscellaneous Acts, the Revised Statutes of the United States, and the provisions of the Federal Constitution applicable to Federal Income Taxation.

All of these laws are annotated, the annotations consisting of abstracts of decisions of the Supreme Court, the Court of Claims, the Circuit Courts of Appeal and the District Courts of the United States. The annotations are in the form of footnotes placed on the same page as the language of the respective acts involved in the decisions. For instance, if the question decided pertains to “ordinary and necessary expenses”, a footnote reference number will be found after the word “expenses”, and the footnote containing the annotation will be found at the bottom of the same page. Thus the subject of the act and the applicable decisions are arranged in such juxtaposition that they may be studied together without inconvenience.

The Acts of 1909, 1913, 1916, 1917, 1918 and 1921 are correlated. Using two pages as a unit, these acts are printed in six columns in such manner that the two open pages disclose at a glance the similar provisions, if any, of the respective acts. In cases where no similar provision or provisions are contained in one or more acts, blank space in the respective column or columns so indicates. If one turns to “losses” allowed corporations as a deduction in the Act of 1921, he will also find the language of the Acts of 1918, 1917, 1916, 1913 and 1909, on the same subject arranged horizontally across the two open pages. The Act of 1921 is used as a base, the sections of the other acts being rearranged when necessary, so that the natural sequence of the provisions of the present law will not be disturbed.

The correlated acts are also annotated in the manner above described.

The combined features of correlation and annotation are exceedingly valuable, for the arrangement permits not only an immediate comparison of the recent Acts, but also gives an abstract of all Federal Court decisions applicable to the provisions of the Acts found on any given page. This arrangement will be invaluable in making amended returns for prior years, in settling questions before the Bureau of Internal Revenue, which questions frequently involve more than one act, and in presenting questions to the Courts for final adjudication.

This book is an innovation in the literature on the subject. Presenting the law as it actually is, it will help to clear up the maze in which taxpayers now find themselves as a result of complicated and frequently changing laws. The work is recommended as one fulfilling a long felt need by all persons interested in Federal Income Taxation.

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#### COMMERCIAL LAW CASES.

A very valuable work in two volumes for general use by Harold L. Perrin, LL.D., Ph.D., and Hugh W. Babb, BA., LL.B., comes to us from the press of George H. Doran Company of New York

This is the first work which has been available covering valuable and indispensable aids to the study of commercial law. The two volumes, Octavo, net \$7.50 in price, combine the text book and case book method of teaching law. In this respect Messrs. Perrin and Babb have seemingly prepared legal text books largely for the use of students and while these books are clearly intended to furnish a text for and a course in commercial law, the cases therein cited will be found indispensable to banks, corporations, individual business men and lawyers. A careful study of these books leads to the opinion that Commercial Law Cases will undoubtedly fill a need long felt in the offices of every general practitioner of law as well as financial expert. The subject matter is systematically arranged. The cases wherein the application and the rule of law is shown, are well selected. Concrete examples of the problems which confront men in daily life and their solution serve to hold the interest of the reader from start to finish.



# PATENT LAWYERS

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# THE Lawyer and Banker

AND

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### *ITA LEX SCRIPTA EST*

*Masters are men who make and govern circumstances, instead of allowing circumstances to govern them.*

We must all, of course, regret and deplore the second stain put, within a year, upon the escutcheon of public official conduct in Massachusetts, but we can surely derive comfort from, and take an offsetting pride in, the facts that, in other office, was found another public servant with right ideals and with all the necessary courage and ability, and that in the Supreme Court of that Commonwealth is to be found an impregnable fortress of honor and justice.

It would be well if every reader of THE LAWYER AND BANKER would read and ponder the full text of the decision of the justices in the Pelletier case. This we say because, entirely above and beyond the mere conclusion of the Court there is, in the opinion itself, that which, if we but reflect, challenges our highest respect and admiration and brings a priceless sense of confidence and security in the ultimate of our governmental institutions. Let us make this matter clear.

Here was the case of a district attorney who had gone wrong. How wrong may be judged by the following excerpts from the findings of the Court:

As to one of the specifications, viz:

In the Coté case, in which the respondent was charged with conspiring with Coakley to frighten by threat of criminal prosecution, the Court finds:—

Even if he had not succeeded in making her give up her civil action or if she had given it up for some other reason than his threats, the respondent nevertheless would have been guilty of a combination with Mr. Coakley to use illegal means to bring about the desired result and of the actual abuse of the powers of his office to that end. The respondent is guilty of these charges.

In the Emery case the conclusion is as follows:—

The use of the machinery of the criminal law even to extort money from Emory would have been an abuse of official power by the respondent. To set in motion to terrorize or to aid in terrorizing Mrs. Chase shocks the moral sense of every right-thinking person. The processes of law, which are designed to defend the innocent and to protect society against the wrongs of the criminal, have been used as instruments of oppression in an attempt to wrest money from the blameless and the aged. The respondent is guilty on these charges.

And finally the Court concludes as follows:

All the material evidence and all the circumstances have been taken into account and weighed with care. Every presumption of uprightness, rectitude and innocence, which commonly characterize the conduct of men in public station, has been invoked in favor of the respondent.

The compelling nature of the evidence has constrained us to make the finding stated. One conclusion alone is possible on the whole evidence. The facts carry their own mandate. It is plain. It cannot be escaped. It is imperative. The findings make clear beyond peradventure of doubt that the respondent is unfit to hold longer the office of district attorney.

Official corruption is sufficient cause for the removal of a district attorney. When private favoritism and personal aggrandizement are placed above principles of obvious justice and considerations of the general welfare by a district attorney, the public good requires that he be removed.

No discussion is needed to demonstrate that, under the findings of fact set forth at length, no other course is open except to perform the duty of removal imposed on us by the statute.

Again we say that the sting and mortification of the dishonor brought on the Commonwealth by an unworthy public servant is largely offset by the record made by the attorney general, with his able and public-spirited assistants, and by the new assurances, amply afforded in the Court's decision, that justice, measured, reasoned, unprejudiced, unwavering, and unchangeable may be surely relied upon by high and low, rich and poor, innocent and guilty alike, at the hands of that tribunal. The passing cloud but serves to emphasize the glory of the light.

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## EDITORIAL COMMENT

An Assistant Attorney General of the United States recently protested against "the centralization which in effect staggered the Department of Justice."

Unless there is a halt in this tendency to saddle all responsibilities on the Federal government, the time will come when we have in Washington a bureaucracy knowing no master—and one day the country will be in ruins.

The American idea twenty years ago left great flexibility and independence to States and localities. It gave them responsibility. The Federal

government confined itself to national administration. It protected the coinage, operated and protected the mails, administered the revenue acts, etc., and the States had the police power which protected public morals, public security, and governed the conduct of citizens according to their wishes and accepted standards. This was a scheme of Democratic liberty. It permitted variations of life with certain limitations. Utah could not have polygamy, but social customs could vary from State to State, and responsibility was on the people.

We are discarding principles of Democratic liberty, and by centralization of authority establishing bureaucratic despotism. Jefferson, opposed to centralization under an aristocratic government, said that the least government was the best government, but he did not see the tendency of a Democracy which he wanted to release from the aristocracy to enslave itself. Herbert Spencer did, when he said that the trend of Democracy was towards slavery.

We had a protection against this in the retention of police powers by the States, and we break down the protection when we seek to take away from the States the control over morals and habits and give it to the bureaus of a central government.

Probably the first break in the protections was made when the theory of applying the interstate commerce act was brought into action, morally and economically, to take the place of local police power. The Mann act did this. It was designed to break up a traffic so vile that only the vilest and most abandoned of persons engaged in it. It was to prevent and punish the trade in white slaves. The traffic was so hideous that the supplanting of local police power was condoned, but the supplanting did not stop there.

A perversion of the original purpose of the act placed the Federal government in control of the private morals of citizens not engaged in the business to be suppressed. Immorality is not condoned, but the offenses which the Mann act reached out to punish were offenses controlled by the State, and they were not aggravated if the offenders went from one State to another.

The Federal government thus undertook correction of private morals and the beginning of a bureaucracy with no limitation of authority was had. The interstate commerce law, a start having been made, was used to prevent other evils, such as child labor, the regulation of which is a State function.

It ought to be. Conditions of life are various in a country of such an expanse of resources and activities. They should be controlled by the governments intimate to them. Because some States were backward, social reformers demanded that responsibility be taken away from them and given to the Federal government. One encroachment after another has been made upon the independence of the States, and thereby upon the independence of the Democracy.

Bureaucracy is the enemy of Democracy. It is the substitution of regulation for free will. It is unintelligent, unresponsive, hide-bound and inconsiderate. The purpose of a bureaucracy is to make positions for bureaucrats. It is a world within itself, expanding and pervading activities

in which it is given a chance. It clutches whatever it touches and reaches out new creepers constantly.

When a Democracy begins to appeal away from its natural sources of power and responsibility to a far away core of authority, it is like a fly appealing to the spider in the nest of the web. If it is the destiny of Democracy to try to reduce all its elements to a dead level of uniformity, it may be its destiny to reduce itself to a species of slavery, the slavery of the individual to the mass.

If Washington is to take control of the private lives of all American citizens, it will be necessary to do more than call law enforcement meetings. It will be necessary to send out procurators and viceroys to take over the administration of States.

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A valued subscriber in New York furnishes us with many magazine and newspaper clippings showing the grim trail of wrecked estates caused by the deceased not having their last will and testament drawn by competent counsel. Again, as remarked by Trust Companies in its March issue:

Tragic are the countless trails of litigation upon which are strewn the wrecks or remnants of great American fortunes and estates—the dire consequence of the habit of procrastination, of blind faith in the appointment of personal executors and trustees, and because testators failed to avail themselves of the best advice and experience in drawing up their wills. How eloquent is the record of fidelity and efficient administration of estates and execution of trusts when confided to responsible trust companies, when contrasted with the many modern examples of ‘Jarndyce and Jarndyce’ with which the courts of this land are congested.

A study of the times brings home to us the lessons of blighted hopes, of attempts to break wills, of quarrels between beneficiaries, of proceedings to oust individual trustees or executors, and of diversion or wastage of funds intended for utilitarian or humanitarian purposes. Today the courts are still grinding along on estate contests and will disputes that have been in litigation for nearly half a century, with the residue of estates or trusts wasted or eaten up by costs.

Over in the Surrogate Court of Westchester County, New York, recently, another chapter was added to the long-drawn controversies over the famous Samuel J. Tilden will, who died in 1886, when a third successor trustee was appointed for the management of the leavings of the Tilden fortune of \$16,000,000, and of which only \$500,000 remains. It may be recalled that the great jurist, Tilden, created what is known as the “Tilden Trust” to convey the residue of his estate for the maintenance of a free library and reading room in New York. The will was broken by a minor beneficiary and the estate divided among heirs by judicial order.

Another action in the long litigation over the estate of Jay Gould, who died thirty years ago, was started the other day when George J. Gould, who was removed as chief executor and trustee in 1919, brought action to require his brothers and sisters as executors, to show cause why his share in the estate had been withheld from him.

At Riverhead, Long Island, suit was brought several days ago by the heirs of the estate of the late Frederic G. Bourne, president of the Singer Sewing Machine Company, to secure an accounting and have the individual executors removed, charging alleged negligence and losses.

Over at Newark, New Jersey, some months ago, the Surrogate declined to validate the will of William A. Barstow, the Standard Oil millionaire, who died February 10, on the ground that the will lacked date, signature and witnesses.

Under a will dated June 18, 1915, the late Amos F. Eno left the bulk of his estate of \$13,000,000 to Columbia University and other institutions. Two juries have declared the will invalid, on the ground of mental incompetency and undue influence. Executors of the estate are now preparing an appeal to the Appellate Division of the New York Supreme Court, and will endeavor to have a previous will probated leaving all to relatives, which, if upheld, will mean a loss of \$7,000,000 to public institutions.

Over in St. Paul a battle royal is being waged over the millions left by James J. Hill, the railroad magnate.

These are but a few examples of thousands of contests which are being fought in courts throughout the land involving large estates, trusts and endowments which might have been avoided if due precautions had been taken in the writing of wills, and if corporate instead of individual executors and trustees had been chosen.

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The decision of the United States Supreme Court in the rent law case which went up from New York goes about as far as anyone could ask in affirming the right of the States to control real estate in private hands for the protection of the public.

The case was one in which a tenant actually signed a lease under which he would have been charged with a large increase in rent. The tenant refused to pay the increase, however, and resisted proceedings to dispossess him, on the ground that the New York rent law, passed to protect the public during the housing shortage, made the increase uncollectable.

The tenant's contention was upheld by the State courts, and the Supreme Court finds that there is nothing in the State law repugnant to the Constitution of the United States. The effect of the decision is that where a social emergency exists by reason of a shortage of houses, the State in the exercise of its police powers may meet that emergency with legislation which conflicts with the ordinary rights of ownership. Private ownership in such cases is not to be considered superior to the health, security and peace of the community at large.

Without attempting to discuss the legal aspects of this decision, it may still be said that it is on the side of reason and humanity, but the power which the court finds to be inherent in the State is one that must be used with great caution. Generally speaking, it is better to leave business to follow economic law, and the right to public interference with private contracts is one that should always be treated as a dangerous remedy for desperate diseases.

And now into court comes a San Francisco man who says he fell asleep in a barber's chair and the barber cut off his mustache. He sets forth:

"That as a result of the said mustache having been willfully and maliciously shorn from the face of said plaintiff, said plaintiff has materially decreased in his personal appearance before the public; his younger children are not able to recognize him, and the plaintiff has extreme difficulty in being recognized at banks, restaurants, garages, golf courses and other places where plaintiff has business."

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Where plaintiff has business, but no mustache.

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This is what is known in court procedure as filing an appearance.

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Even his soup did not know him.

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The mustache, the complaint cites, "was not less than three inches in width and measured six inches from tip to tip." He sues for \$229. You can figure for yourself how much that is from tip to tip, using in your computation, the customary barber shop tip.

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The whole thing appears to be as plain as the nose on his face.

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Opinions of mustaches differ. There are those who contend that the man is entitled to the \$229, but there are those, also, who contend that he should be cut off without a cent.

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"Two hundred and twenty-nine dollars for a mustache!" exclaimed the Assistant Editor. "How has he the face to ask it!"

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Still, there is the jury. It may say that in appraising the mustache at \$229, the man is a little off.

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The jury may hold that he has his figures twisted, having, as seems to be the case, nothing else left to twist.

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How terribly the man takes on, doesn't he? His mustache cup of sorrow seems to be overflowing.

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However, when all is said and done, you can't blame a man for refusing to take \$229 when it is right under his nose.

# CANNOT ROB PETER TO PAY PAUL

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**High Court Rules That Funds Borrowed of Savings Department by Commercial  
Department Must be Repaid**

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When the Prudential Trust Company of Boston was taken over by the bank commissioner, in September, 1920, it was discovered that the commercial department had been limping along for some time, with the aid of cash borrowed from the savings department, through an exchange for such cash of investments held in the commercial department. The bank commissioner felt that the commercial department should pay back this cash, and receive in return the securities that it had turned over to the savings department. He required authority from the Supreme Court to take such action. In the case of "Commissioner of Banks, in re Prudential Trust Co.," the Supreme Court has given him such authority, and has decreed that the commercial department must turn over \$285,410.86 in cash to the savings department, and take back the securities that were exchanged for this cash. The effect, of course, is to greatly help the savings depositors, in the distribution of the assets of the defunct trust company.

The opinion of the Supreme Court, prepared by Chief Justice Rugg, is in part as follows, and is reprinted here, because of the general interest of banks everywhere in legal questions relating to the separation of the assets of trust companies into several distinct departments.

## **The Court's Opinion**

"The commercial department needed money in order to replenish an insufficient reserve of cash which ought to be kept on hand for the purpose of meeting clearing house and counter demands. The savings department had cash, notes about to fall due, railroad and government bonds, and railroad and government bonds owned or held as collateral, which could be turned into cash immediately. From time to time notes held in the commercial department were exchanged for cash or securities of the savings department. All these notes were unlawful investments, because none of them were approved by the investment committee of the savings department as required by law. Most, if not all of them, also were unlawful because of the nature of the securities or because of an excessive amount loaned to individuals. In some instances, also, there were placed in the savings department, in return for its cash and securities, treasurer's checks of the trust company, which chiefly were used as temporary vouchers carried as cash items and not collected. The executive officers of the trust company arranged these transactions for the purpose of maintaining the commercial department in operation as a going concern without



regard to the requirements of law established for the security of the savings department and its depositors.

"The settled course of legislation has been to invite the scanty savings of the poor, the wages of the laborer, and the earnings of the thrifty for deposit in savings banks. They have been under governmental observation and inspection. They have been regarded as proper objects for vigilant watchfulness in order that public confidence might be won and kept unimpaired and the highest practicable degree of security attained. The possible risks of too close relations between savings banks and banks of discount led to the enactment of statutes requiring physical separation between the business rooms of the two classes of institutions and the prohibition of identity of certain executive officers. When trust companies first were empowered to establish savings departments, attempt was made by legislation to maintain as great security for depositors in such departments as was thought practicable, notwithstanding the circumstances that they were conducted by the same corporation and officers which also carried on the business of general banking for deposit and account.

"Among the provisions to that end were requirements that all deposits in savings departments should be 'special deposits,' that they should all be placed in a separate department to be called a savings department, that all investments should be made in accordance with the law governing savings banks, that such deposits and investments should be appropriated solely to the security and payment of savings deposits and not mingled with other property of the trust company. The capital stock of the trust company, with stockholders' liability thereunder, is held as security for the payment of such deposits, and the depositors in such departments have an equal claim with other creditors on other assets. These provisions of statute manifest a legislative purpose to place savings departments of trust companies as nearly as possible on the same footing of security as savings banks, and to overcome so far as practicable the risk arising from the temptation to officers of embarrassed trust companies to help out any weakness in the commercial department by resort to the more conservative and secure assets of the savings departments.

"These provisions, having regard to the ends sought to be attained, must be treated as mandatory and not merely as directory. They would fall short of accomplishing their purpose if they are held merely as binding upon the conscience of officers of trust companies. These provisions have the further effect of requiring the restoration to the savings department of the equivalent of any withdrawals, swapping of investments or other transactions between it and the commercial department made contrary to the statutes to the harm of the savings department and for the apparent or supposed advantage of the commercial department. Deposits in the savings departments of trust companies are presumed to be made upon the faith of the statutes for their protection. This faith must be kept in the performance as well as in the word of the law. The trust company is a single legal entity. Its departments are established by the statute, but nevertheless it is one corporation. The depositors in the commercial department must be presumed to have become customers with knowledge of all preferences established by law for the benefit of the savings department. In many aspects, the relation of the trust company to its depositors in its savings department is that of trustee to his cestui que trust, and to its commercial depositors that of common law debtor to his creditor. But it was not the design of the General Court that the conflicting interests of the two classes of depositors under the circumstances here disclosed should be worked out on the theory of trading trust funds. That would render illusory to a large extent the safeguards

apparently held out by the statute for the protection of the depositor in the savings department.

"The result to us is to follow from these considerations that, in the administration of the estate of the trust company by the commissioner, all the losses suffered by the savings department by reason of the transactions of the officers of the trust company in transfer of assets of the savings department to the commercial department must be made good out of the commercial department. This decision rests upon the true construction of the statutes."

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### LAWYERS TO GATHER IN SAN FRANCISCO

The American Bar Association is to hold its annual meeting this year at San Francisco, on August 9th, 10th and 11th. In the forty-four years of the Association's existence, this is the first time that it has met in California. The only time it ever went to the Pacific coast was in 1908, when the convention was held in Seattle.

Many distinguished lawyers will be in attendance, and unusually important matters will be considered, both in addresses and debates. Secretary of State Charles Evans Hughes has been invited to deliver the annual address. The significance of this is obvious. Elihu Root, Mr. Chief Justice Taft and many other leaders of the bar will be in attendance. Lord Shaw, one of the most distinguished law lords of Great Britain, will be the guest of the American Bar Association, representing the British bar.

As usual, the National Conference of Commissioners on Uniform State Laws will meet during the week preceding the session of the American Bar Association.

Great enthusiasm is being manifested on the Pacific coast over the approaching convention. Every effort is being made not only to increase the membership of the American Bar Association prior to the date of the convention, but to assure as near a hundred per cent attendance of the Pacific coast members as possible.

San Francisco is the ideal convention city, and August is the ideal month for holding the convention there. Bright sunshiny days, cool evenings and comfortable nights make it possible for men to meet and deliberate in comfort. The time set for this convention is vacation time. Every lawyer who has been accustomed to attending the conventions of the American Bar Association should spend his vacation in San Francisco this year. Not alone is San Francisco attractive as a convention city, but the surrounding country offers opportunity for many interesting and inexpensive side trips. Within one hundred miles of San Francisco is a wealth of scenic and natural attraction not found anywhere else in the United States.

# THE RIGHT TO BE CURED

By Charles A. Enslow of the Janesville, Wisconsin Bar.

The right of supervision in all things relating to the health of the public rests within what is known as the "police-power" of government, by which is meant the authority of the government to regulate the conduct of the individual citizen to the end that every one may enjoy the greatest possible freedom of action consistent with the general welfare of all of the people; but in respect to the police-power, it must be understood that in this country, consisting as it does of many independent sovereignties, the police-power is inherent in and has always belonged to the several states of the Union, and that, in so far as it has to do with matters connected with the conservation of the public health, has never been surrendered to the Federal government, for which reason the right of the states to control and regulate the practice of medicine within the state is absolute, complete and exclusive.

License Cases, 5 Howard, 504, 12 L. ed. 256.  
Slaughter House Cases, 16 Wallace, 36, 21  
L. ed. 394.  
Jacobson vs. Massachusetts, 197 U. S. 11, 48  
L. ed. 643.

While it is true that the Federal government has some inherent right to provide for the safeguarding of the health of the public, it is nevertheless a fact that by reason of the duality of our system of government—and in which all of the powers of sovereignty are reserved to the several states, except so much of their power as has been surrendered to the Federal government specifically and totally,—the Federal government is limited in its activities to the use of just so much power as has been relinquished by the states and delegated to the Federal government under the provisions of the Constitution, and no more, and the power to regulate and control the practice of medicine is not one of the powers delegated to it.

New York City v. Miln, 11 Peters, 102, 9 L.  
ed. 648.  
Gloucester Ferry Co. v. Pennsylvania, 114  
U. S. 196, 29 L. ed. 158.  
License Cases, 5 Howard, 504, 12 L. ed.  
256.  
McCray vs. United States, 195 U. S. 27, 49  
L. ed. 78.

There is no such thing as a divided sovereignty. Jurisdiction—control—is vested entirely either in the state or in the nation, and is not divided between them.

Matter of Heff, 197 U. S. 488, 49 L. ed. 848.  
Bowman vs. Chicago, etc. R. Co., 125 U. S.  
465, 31 L. ed. 700.

Congress cannot, therefore, establish a uniform Medical Practice Act to govern the education, qualifications, or licensing of physicians,

surgeons, or healers, nor regulate the conduct of their business, because to do so would be to invade the jurisdiction of the several states reserved to them as a part of their inherent police-power.

Because of this inability of the Federal government to establish by statute uniform requirements for determining the fitness and qualifications of persons who desire to engage in the practice of the art of healing, the science of medicine, surgery, and healing is deprived of what in other fields of endeavor has been proved to be a great stimulus—government supervision and support;—and as a nation this is one of the very few that does not maintain a national institution for the teaching of medicine and surgery with a view to providing physicians, surgeons and healers of a uniform standard of education and qualifications in their several and respective schools of theory and practice; and it is due to this want of centralized standardization that the science and art of healing is in the present chaotic condition through strife, contention, jealousy, hypocrisy, and efficiency resultant therefrom.

No practitioner can be certain of his position under the present conditions when his license is subject to the right of the state to require him to comply with whatever restrictions and regulations it may thereafter impose, even to the point of prohibiting him to further engage in business under the license previously granted.

Reetz vs. Michigan, 188 U. S. 505, 47 L. ed.  
563.  
Meffert vs. State Board, 66 Kansas, 710, 72  
Pacific, 247.  
State vs. Webster, 150 Indiana, 607, 41 L.  
R. A. 212.

And the public has no assurance that a person who holds himself or herself out as a physician, surgeon, or healer is anything more than the spawn from a "diploma-mill", or the wind-blown, hand-picked, ward-heeler pet of some grafting examining board.

What chance has the public when some examining boards, as has lately been charged, will, for a consideration, turn loose to prey upon the public as physicians, surgeons, osteopaths, chiropractors, and undertakers men and women wholly unlearned in those professions and occupations?

Chicago Tribune, April 1, 1922, ante and et  
seq.  
Chicago Herald-Examiner, *ibid.*  
Chicago Daily News, also.

Within recent years it has come to be generally conceded that one of the principal and greatest duties a government owes to its people is to provide means for the conservation of the public health; and the fact that the public health has not been given the attention that should have been given to it in the past was brought home to our people when physical examination was made of hundreds of thousands of our

young men in connection with the draft for service in the world-war, and at which time it was found that a surprisingly large per cent of our supposedly best young men were unsound and totally unfitted for the service expected of them.

It would seem to be axiomatic that the same degree of efficiency and skill would be of advantage in the treatment of the same disease in every part of the country and that those who offer to treat that disease should be of equal proficiency in the basic, theoretical principles of their profession regardless of the locality in which they offer to practice.

To the unprejudiced mind, it would appear that when the Federal government can mould and twist the Constitution in fashion to permit of laws like some of those now in effect to be enacted and their validity upheld by the highest tribunal in the land, it ought to be able to establish a uniform law to license, govern and regulate those persons who wish to engage in the business of healing their fellows, in view of the fact that the welfare of the whole nation, in every one of its relations, depends upon the health and sturdiness of its people.

There is not, however, any clause in or provision of the Constitution that can, by even so illogical and shocking an interpretation as has heretofore been made of its provisions, be brought to cover a Federal enactment uniformly regulating the practice of medicine, surgery and healing, throughout the whole country, and if the Federal government is ever to be empowered to regulate the practice of medicine, it will have to be done through the adoption of an amendment to the Federal Constitution.

It is true that the Federal government in the Harrison Act has given the public protection from the indiscriminate sale and use of narcotics; the Mann Act assumes to protect the morals of the people; the Volstead Act regulates the people's drink; the Pure Food Law has largely done away with the secret adulteration of food, and many other restraints have been placed upon and have taken away the liberty of the people to engage in practices prejudicial to society, and such laws have been held by the Supreme Court to be within the police-power delegated to the Federal government by the states, although it has been suggested that the language of the Constitution had to be considerably stretched and twisted in order to bring some of these laws fairly within its meaning.

Uniformity in understanding and knowledge of the basic theoretical principles that make for skill and efficiency cannot be secured unless every person applying to be licensed to practice the healing art is required to conform to uniform standards in education and qualifica-

tions within his or her particular school or system of healing, and in the manner of being licensed to practice and in conduct in practice after being licensed.

The greatest need of the present time in the matter of the conservation of the public health, whether from the view-point of the medical men and healers or the lay-citizen, is just such uniformity in the law regulating the practice of the art of healing, however it be made uniform—whether it be by means of an amendment to the Federal Constitution and laws enacted thereunder, or by the enactment of a single uniform Medical Practice Act by the legislatures of the several states to supercede the many conflicting statutes now to be found in the books.

Every school of medicine, surgery, and healing, no matter how denominated or what particular or peculiar method it employs in practice, would perform a truly patriotic duty if it labored for the enactment of such a law and after securing the enactment of it demanded and compelled its strict enforcement by the government and absolute compliance with it by the profession, for if we are to maintain ourselves as a free and independent people, we must have the man-power with which to do it, and man-power is dependent upon good health, and good health waits upon the diagnostician, the physician, the surgeon, and the healer.

The government, both Federal and State, is ever alert to aid the farmer to produce his crops and the railway corporations to distribute the crops to the people, and millions of dollars are expended annually to maintain an army and navy which history has shown to have been employed to ward off imaginary dangers only, year after year, and hundreds of thousands of dollars have very properly been spent to conserve the health and improve the quality of horses, cattle and hogs; and it is only doing a reasonable thing to suggest that those engaged in conserving the health of their fellows and laboring to keep the man-power of the nation up to the highest possible standard should be assured by the Federal government a compensation for their labor and service in keeping with its value in comparison with the compensation paid to others who devote their lives to the betterment of our farm animals, or those who study and labor in the interest of the public security and defense.

Men and women who devote their lives to the amelioration of the ills of their fellows are entitled to and should receive recognition and credit for their endeavors and their accomplishments. Their vast knowledge gained by study, investigation and experience—experience gained more often than otherwise amid great danger to themselves—

ought to be, and is, recognized in law as property of as tangible a nature as is the gold accumulated by the tradesman or the land reclaimed and made to yield its substance to the husbandman; and this property of the healer should be paid for at its full value when taken and used in the interests of the public, and it must be admitted that in every one of his professional acts the physician, surgeon and healer is engaged in doing a duty and service to the public and for the general welfare of the nation, for one life saved is of more real benefit to the country in its hour of dire need than all of the nation's gold. No battle has ever yet been fought the victory in which did not turn upon the single act of one sole and separate individual. Save the individual citizen and the population will take care of itself.

That they are not accorded such recognition and given proper credit and compensation is due to the envy and jealousy, the strife and dissension between the several schools or systems and the lack of open-minded fairness and unity of purpose in the practitioners within the several schools.

In every case, regardless of which class of practitioner is engaged, the primal test to which the patient is put is one to determine the seat and cause of the malady, in order that the practitioner may apply the remedy, and it is in this primal test that the practitioner displays his or her efficiency and skill, or lack of it, with resultant good or evil to the patient, and it is to safeguard the patient in this test that laws are enacted to require certain qualifications in the practitioner before permitting him or her to make the test.

It is upon the question of the method to be employed in the diagnosis of a given case that the several schools of medicine and healing differ, each claiming that no other method than that employed in that particular school or system is or can be correct and conclusive. The allopath refuses to concede that the osteopath can possibly properly diagnose a case by the method employed by him, and the osteopath retorts that the diagnosis made by the allopath is largely pure guesswork; and the allopath and the osteopath and the homeopath all suffer megrim when the chiropractor asserts that a true diagnosis may be had by still more simple and accurate means than employed by any of them. Then the selfish human element surges to the fore and the votaries of each school hasten to the lawmakers with the demand that the public be protected through laws requiring the public to employ this school or that school of medicine—and damning the other fellow.

The patient whose malady is to be located and cured often is lost sight of entirely in the melee; and perhaps in many instances it is just as well for the patient, too, since many times a little exciting diversion

is more efficacious than is a pill, a pull or a push in accomplishing a cure.

As has been said hereinbefore, the public itself recognizes the strength and the weakness of the several schools of medicine and healing, and finds each of them good within its particular sphere; and the public will never permit either of them to be legislated out of existence but will insist that, within proper limits and under proper regulation, all of the schools and systems be given equal opportunity to demonstrate the time-worn axiom of the survival of the fittest.

The public is a good old sport—even the busiest man always finds time to stop long enough to watch one rooster whip another.

All of the schools and systems being good, provision should be made for their regulation by law, and in such regulation consideration should be given by the law-makers to the peculiar characteristics of each school or system to the end that classification and regulation would produce the highest possible development of skill and efficiency in each of the practitioners in each school or system, and not retard the development of any of the schools or systems by requiring the practitioner of any one school to attain proficiency and skill in practice in another school or system with which he has nothing to do and which is entirely foreign to the methods employed by him in his practice within his own system, since a person professing to follow one system or school of medicine cannot be expected and would not be hired by his employer to practice any other.

*Force v Gregory*, 63 Connecticut, 167, 27 Atlantic, 1116.

*Spread v Tomlinson*, 73 New Hampshire, 46, 59 Atlantic, 376.

To require identical educational qualifications, skill and efficiency from physicians, surgeons, oculists, osteopaths, chiropractors, and others, when their methods of diagnosis and treatment are wholly unlike, although the results thereof may be the same, is to unjustifiably discriminate by refusing to acknowledge a difference between them and to burden and oppress those of them who are engaged in a limited, specialized and deprive them of the right to enjoy equally with all others similarly situated and circumstanced the privilege of pursuing an ordinary calling, for "while recognizing to the fullest extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other."



*Cotting v Kansas City, etc.*, 183 U. S. 79,  
46 L. ed. 92.  
*Halter v Nebraska*, 205 U. S. 34, 51 L. ed.  
696.

The courts have also said that "the inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation".

*McPherson v Blacker*, 146 U. S. 1, 36 L. ed.  
869.  
*Pembina, etc., v Pennsylvania*, 125 U. S.  
181, 31 L. ed. 660.

It is well understood that from the very first the old school of medicine has been prejudiced against the newer schools and systems, and that every possible effort has been put forth to retard the progress and belittle the newer schools, and that every argument conceivable has been used to secure the enactment and to sustain the validity and constitutionality of laws that plainly discriminate in favor of the old school and against the newer.

*People v Love*, 298 Illinois, 304, 131 North-  
eastern, 809.

The sophistry to be found in the opinions as written and filed by the courts in connection with the trial of cases coming before them, would be amusing were it not for the fact that the opinions are *stare decisis* and work incalculable harm by biasing the judgment of and leading others to accept and follow alleged principles of right thinking and which alleged principles in many instances were announced as such by men swayed by prejudice due to limited knowledge and understanding of basic facts, if for no other reason.

To require of a chiropractor that he stand an examination upon subjects with which he has nothing to do in the practice of his profession is to discriminate against him and cast upon him burdens beyond such as are reasonably necessary to the object sought to be attained, and as the discrimination is based upon matters which have no relation to the object sought to be accomplished, such discriminatory burdens would sustain the unconstitutionality of the statute imposing them.

*Atchison etc. R. Co. v Matthews*, 174 U. S.  
96, 43 L. ed. 909.  
*State v Kreutzberg*, 114 Wisconsin, 530, 90  
Northwestern, 1098.  
*Fisher Co. v Woods*, 187 N. Y. 90, 79 North-  
eastern, 836.  
*Lawton v Steele*, 152 U. S. 133, 38 L. ed.  
385.  
*State v Rice*, 115 Maryland, 317, 80 At-  
lantic, 1026.

It has been held that a statute which requires the physician attending at the birth or death of a person to investigate and report as to facts not necessarily or naturally coming within his knowledge in the due

course of his employment is unconstitutional because it is unnecessary, unreasonable and arbitrary, and compels him to discover and report non-professional information without compensation.

*State v Boone*, 84 Ohio St. 346, 39 L. R. A. (N. S.) 1015.

How, then, can the right of the state to require the chiropractor to educate and perfect himself in subjects that have no place or part in his profession—non-professional information—be sustained?

"It has been the practice of different states, from time immemorial, to exact in many pursuits, a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon examination of parties by competent persons, or inferred from a certificate to them in form of a diploma or license from an institution established for instruction on the subjects, scientific or otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.

If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty.

It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

*Dent v West Virginia*, 129 U. S. 114, 32 L. ed. 623.

*State v Knowles*, 90 Maryland, 646, 49 L. R. A. 665.

In view of the fact that the osteopath and the chiropractor in the practice of their professions do not use and would not use drugs under any circumstance, it cannot be said that a knowledge of materia medica is in any way "appropriate to their calling of profession," but it may well be said that it has no relation to their profession, and that it cannot be attained by reasonable study and application, since any study and application for the purpose of learning something for use in a profession when what is learned is not used in that profession or calling is unreasonable and the requiring that it be done is an unnecessary and arbitrary restraint which goes away beyond the limits of "regulation" and far adrift upon the sea of destructive discrimination.

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Lawton v Steele, 152 U. S. 133, 38 L. ed. 385.  
 In re Wiltshire, 103 Federal, 620.  
 Health Department, etc., v Church, 145 N.  
 Y. 32, 39 Northeastern 833.  
 State vs. Redmon, 134 Wisconsin, 89, 114  
 Northwestern, 137.

It is not enough that some of the people from time to time, or even generally, demand or require it, but, instead, it must appear to be in the interests of the people generally and that it is reasonably necessary or essential to their interests.

State vs. Redmon, 134 Wisconsin, 89, 114  
 Northwestern, 137.

"So in all cases where the interference affects property and goes beyond what is reasonable by way of interference with private rights, it offends against the general equality clause of the constitution; it offends against the spirit of the whole instrument; it offends against the prohibitions against taking property without due process of law, and against taking private property for public use without first rendering just compensation for it."

Bonnett vs. Vallier, 136 Wisconsin, 193,  
 116 Northwestern, 885.

All of the courts, as indicated by the excerpts from their opinions herein cited and quoted, insistently reiterate that all regulatory statutes must be "reasonable" and that they must be "reasonably" interpreted and enforced and while it would be next to impossible to define what would and what would not be "reasonable" in relation to many things with which legislatures concern themselves, it is held that in order to be reasonable it is not necessarily that it be what is best, but what is fairly appropriate to the purpose under all of the circumstances will suffice, and "reasonable", as applied to a law, is manifestly not what extremists upon one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what 'from the calm sea level', so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. Common sense as to reasonable requirements and reasonable means of securing such requirements should prevail, not the extreme views of well-meaning persons as to what is for the best. Idealists will often find efforts to force their standards of living upon people generally by legislation barred by constitutional limitations".

Bonnett vs. Vallier, 136 Wisconsin, 193, 116  
 Northwestern, 885.

The chiropractor holds himself out as a drugless healer or physician and represents that his treatment consists of manipulations and nothing more, and it is fair to assume that any person seeking his or her services would not expect any but treatment by manipulation according to the chiropractic method.

Force vs. Gregory, 63 Connecticut, 167, 38  
 A. S. R. 371.

and certainly would not seek out a chiropractor with the hope or expectation to have drugs employed in the cure of his malady; and chiropractors, being of the kind to do credit to their profession, finding a case that would not yield to cure through adjustments, as indicated in the diagnosis or during the treatment, would call in consultation, or direct the patient to apply for cure to, a practitioner of a different school.

The opposition of the medics to the drugless school seems to be due to the fear that some drugless healer might undertake to prescribe or administer drugs sometime and that it might be dangerous to the public if such thing were to happen in view of the fact that the healer might not have a knowledge of therapeutics; but since oceans of drugs have been administered by those who were supposed to have a knowledge of therapeutics as an experiment and purely with the hope that it "might hit the spot", and without visible injury to the public, it might be that the fear of the medics is groundless.

It would be to impeach the integrity of the great majority of drugless healers to say that they must all be versed in the scientific use of drugs as are the practitioners of the "old school", in order that it might be rendered impossible for any one or some of them to undertake to administer drugs in an endeavor to effect a cure; and it has been said that, in order to prevent the infliction of a public injury by some few persons engaged in a certain occupation or profession, who persist in conducting the business so that the public suffers, there is no justification for the enactment of statutes to prohibit honest men from conducting their business in an honest manner and to the benefit of the public.

*Tolliver vs. Blizzard*, 143 Kentucky, 773,  
34 L. R. A. 890.  
*State vs. Redmon*, 134 Wisconsin, 89114  
Northwestern, 137.

As well might it be insisted that all ministers be put and kept in jail because some few of them persist in "falling from grace."

While it might readily be maintained that the practitioners of the several schools or systems are all engaged in treating human ills, it would be difficult to sustain the assertion that they are all members of the same profession or engaged in the same business, in contemplation of law, consideration being given to the variant means employed in practice and in the attainment of their objective by the several schools.

The Medical Practice Acts in nearly all of the states recognize the distinction between physicians and surgeons—the "old school"—and the osteopaths, the chiropractors, the dentists, and others who treat human ills by the drugless method, and place each in a separate and distinct class from members of the "old school", in so far as recognition of the difference in their methods of operation is concerned, and

this differentiation of them by name in the statutes determines the fact of some material difference between them, since the very idea of classification is that of inequality.

Clark vs. Kansas City, 176, U. S. 114  
44 L. ed. 392.

Atchison, etc. R. Co., vs. Matthews, 174  
U. S. 96, 43 L. ed. 909.

The courts, interpreting the minds of the legislatures, as indicated by the many Medical Practice Acts, have likewise recognized osteopathy and chiropractic as distinct and separate professions, and not as mere branches of the old school of medicine.

Nelson vs. State Board, 108 Kentucky, 769,  
50 L. R. A. 383.

State vs. Biggs, 133 North Carolina, 729,  
46 Southeastern, 401.

State vs. Gallagher, 101 Arkansas, 593, 143  
Southwestern, 98.

People vs. Love, 298 Illinois, 304, 131 North-  
eastern, 809.

State vs. Johnson, 84 Kansas, 411, 114 Pa-  
cific, 390.

"The legislature cannot discriminate against chiropractors or osteopaths as to the time of professional education required, where no reason can be perceived for such discrimination,

People vs. Love, 298 Illinois, 304, 131  
Northeastern, 809.

and this being so, upon what theory or principle of right can the legislature discriminate against them by requiring of them educational qualifications with respect to matters and things in no way related to their professions, their professional duties or practices?

There is no theory or principle of right as comprehended by reasoning men under which it can be done, and the only loop-hole of escape from a classification for osteopaths and chiropractors separate from physicians and surgeons of the old school, and separate qualifications required of them, is for the old school to insist, as it has and does, that the osteopaths and chiropractors are "practicing medicine" and, therefore, must be subjected to the same classification for educational and other qualifying purposes as themselves.

*(To be Continued.)*

# RECENT INSURANCE LEGISLATION

(By Thomas I. Parkinson and J. P. Chamberlain)

In the Revenue Act of 1921 there was included an article imposing a novel Federal tax on life insurance companies in lieu of corporate income and profits taxes. This tax takes account of the fact that the reserves of a life insurance company are accumulated annually to provide the funds to meet the policies on their maturity. Therefore, it is provided that of the income of a life company there shall be exempt from income taxes a sum equal to 4 per cent of the legal reserve. The excess above 4 per cent is subjected to tax. One of the most interesting features of this tax is the skillful way in which the constitutional exemption of income from public bonds is avoided. While the act specifically continues the exemptions provided for in the Revenue Law in the case of income of Liberty bonds and state and municipal bonds, the amount of this deduction is deducted from the sum which becomes free from taxation as representing 4 per cent of the reserve. The life company enjoys a freedom from taxation up to 4 per cent of its reserve, whether or not a portion of this income is derived from Liberty or state bonds. The result is substantially to avoid the constitutional exemption enjoyed by income from state and municipal securities in the hands of life insurance companies. It is easy to see the possibilities of further extension of this device which may have a bearing on the necessity for a constitutional amendment to make state and municipal bond income subject to Federal income taxes.

The "incontestible clause" is required by the laws of most of the states to be inserted in life insurance policies. The statutes usually provide that the policy shall state that it "shall be incontestible after two years from its date". In *Ramsey v. Old Colony Life Co.* (297 Ill. 592, 1921) the two-year period had not expired at the time of the insured's death but had expired before action was brought on the policy. The court held the policy incontestible, rejecting the argument that the intention was to make the policy incontestible only where the insured lived through the two-year period. Statutes were promptly passed in Ill. (1921, p. 482), New York (1921, Ch. 407) and Pa. (No. 284 §410) amending the incontestible clause so that the life policy is made incontestible only where it has been in force "during the lifetime of the insured" for the period of two years. This decision and these amendments indicate the importance of accuracy in the phrasing of such statutory provisions. Nevertheless the Wyoming

Insurance Code adopted in 1921 (*Ch.* 142, §32) has included an incontestible clause which follows the wording of the Illinois statute prior to the amendment. That some confusion may result from the varying language of the incontestible clause in the different states is shown by the Ohio Insurance Commissioner's recent disapproval of policy forms containing an incontestible clause in the language of the New York and Illinois amendments because the Ohio statute does not contain the language of the amendment.

Another result of the interpretation put upon the incontestible clause in the Ramsay case is that if the Insurance Company is to enjoy the right to contest the policy for the full two-year period, it must be permitted to bring action to avoid the policy after the insured's death, if death occurs within the two-year period. Heretofore it has been held that the company could not proceed in equity for a rescission of the contract because after the insured's death it enjoyed a full remedy in an action at law by the beneficiaries.

The contest between the creditors and the beneficiaries of the assured for the proceeds of his life insurance policy is illustrated in several recent statutes. The right of the trustee in bankruptcy under §70-a of the Federal Bankruptcy Act (*Cohen v. Samuels*, 245 U. S. 50) to demand the cash surrender value of the policy when the insured has reserved the power to change the beneficiary, is now established; but this rule does not apply where the proceeds of the policy are by the laws of the state exempt from creditors. Alaska (1921, *ch.* 29) provides that the proceeds or present value of a life policy "shall inure to the sole and separate use and benefit of the beneficiaries" and shall be free from the claims of creditors. The Wyoming Code (§36) expressly declares that the reservation by the insured of the right to change the beneficiary "shall in no wise make any value payable thereunder either before or after the death of the insured available to creditors in any proceeding in law or in equity."

The right of a minor to contract for life insurance in favor of himself or specified near relatives is declared in Connecticut (*Ch.* 93) and Maine (*Ch.* 327). These acts expressly give to the minor all the contractual rights under an insurance policy which might be exercised by a person of full age, including the power to give a valid discharge for the surrender value or other benefit accruing under the policy.

The "insurable interest" necessary to sustain a life policy is defined in Pennsylvania (*No.* 28, §412) as "an interest engendered by love and affection" or "a lawful economic interest in having the life of the insured continue, as distinguished from an interest which would arise only by the death of the insured." The definition seems to change

the rule established by the Pennsylvania cases, for example, that an adult son has an insurable interest in his father's life only when legally liable for his support, and illustrates the difficulty of codification of general legal principles.

Corporations are given an insurable interest in the lives of their officers, stockholders or members in Texas (*Ch. 84.*) In declaring an emergency for the purpose of making the act immediately effective, the legislature refers to the fact that the courts of Texas had previously held that corporations did not have an insurable interest in such cases. It is not clear from the statute whether it simply authorizes the corporation to be named as beneficiary in a policy taken by the corporate officer, or whether the corporation is authorized to become the prime mover in taking the policy upon its officer's life.

Workmen's compensation insurance laws illustrate the tendency to convert liability insurance protecting the insured against loss by reason of damage to persons or property into insurance giving the person suffering such damage a direct right of action against the insurance company. Rhode Island (1921, *Ch. 2094*) goes further and requires all liability policies to contain a provision making the insurance company directly liable to the person suffering the damage. This effort to assist the claimant in a tort action to realize on his judgment creates some interesting situations. The Rhode Island act gives the benefit of the insurance contract to a third person, who is unknown to either of the parties to the contract at the time it is made. A person injured through the negligence of one who carries no insurance is left to his remedies against the tort-feasor alone. If the injured person came by his damage through the negligence of a tort-feasor who happened to carry insurance, the policy stands as a guarantee of payment of a judgment against the tort-feasor. The result is to give insurance protection to those suffering injury at the hands of persons who have been thoughtful enough to take out liability insurance.

The effect of a breach of warranty in a fire policy is changed by Michigan (*H. B. 68*), which provides that no fire policy shall be avoided by a breach of a condition where the loss does not happen during the breach or is not occasioned by the breach, or the underwriter is not injured by the breach. In so far as this permits a recovery for a loss occurring after breach but not during the continuance of the breach, it is in accord with the decisions which hold that a temporary breach suspends but does not avoid the policy. But in so far as this statute prevents the avoidance of a policy because of a breach which does not injure the underwriter or which does not cause the loss it



changes the rule that breaches of warranty avoid the policy irrespective of their materiality in contributing to the loss.

An interesting new power is conferred upon the insurance commissioner by New Hampshire (*H. B. 294*) which authorizes him to investigate the origin of fires in order to determine whether they are the result of carelessness or design. If he should be of opinion that there is evidence sufficient to charge any one with the crime of arson, he is directed to cause the arrest of such person and to furnish the prosecuting attorney with all the evidence which his investigation has disclosed.

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#### WIGS FOR FAIR ENGLISH BARRISTERS.

If blonde or brunette woman lawyers are to turn the heads of susceptible English jurymen they must do it by the charms of wit, not by meretricious charms of person. Laughing complexions defy the regulationists, trim ankles may possibly peep out toward recognition, but in other respects the woman lawyer will find the effort to "make her as the man" fairly effective. The lord chancellor's committee has drawn up rules as unalterable as the laws of the Medes and Persians, about like this:

Women must wear ordinary barristers' wigs, completely covering and concealing their own hair; ordinary barristers' gowns, and their dresses beneath must be plain black or very dark, high-necked, long-sleeved and not shorter than the gown, with high, plain, white collar, and barristers' bands.

# AN INDEPENDENT JUDICIARY THE SAFEGUARD OF AMERICAN LIBERTY

By Hon. Alex. C. King, Circuit Judge for the Fifth Federal District of Georgia.

Behind all existing or proposed codes of law and schemes for judicial procedure, and even for government itself, lies the fact that they are only means to an end, and that that end is the protection of the individual in his rights against the aggression of individuals, one or many, or the usurpation of government itself.

It is commonly assumed, because a government is popular in form, that therefore the citizen is removed from the danger of tyranny. A little reflection will convince anyone that such a government, if not itself observant of justice in its dealings, may become more dangerous to individual liberty and vested rights, than any autocrat.

Where a tyrannic monarch rules, his oppressions usually press upon the great majority of his subjects, and public opinion is a check, a brake, which finally deters, or breeds resistance.

Where the sovereign majority rules, there is no check to its absolutism, except its obedience to those abstract ideals of law and justice, which it has expressed in its constitutional enactments.

In a government, which recognizes the civil authority as the means of securing obedience to the laws, the judgments of the courts must be regarded as the last word and as the means for the protection of all individual rights.

Except as the courts are able to enforce such rights, regardless of public clamor, the government of constitutional limitations becomes a government of unlimited absolutism.

As far back as the times of the Greek republics, Aristotle wrote:

"If justice is the will of the majority, as I was before saying, they will unjustly confiscate the property of the wealthy minority . . . But although it may be difficult in theory to know what is just and equal, the practical difficulty of inducing these to forbear, who can if they like, encroach, is far greater; for the weaker are always asking for equality and justice, but the stronger care nothing for these things."

Everywhere that power of intellectual and spiritual conception which can realize abstract ideas and ideals with such clearness that they become vital, and govern the conduct, has been the aspiration of the advance guard of the lovers of progress. In religion, the conception of an angry physical deity, who ruled as some superior monarch, was at

one time universally held, and only after numerous lapses, did the ancient Hebrews reach a point where they could hold to the idea of an unseen diety, much less one not material, but spiritual.

The minds of men in the sphere of human conduct have rarely ever risen to realize, as a fact, "Sovereignty", as apart from some concrete expression of it. A king, a consul, a body of nobles, a majority, each and all have, in turn, been looked to as the sovereign. But not until a nation rises to that plane where it can recognize as the only sovereign, abstract law and justice; when majorities, however large, will recognize their duty of allegiance to sovereign law, and will act upon the duty of reverence for, and obedience to, that law, will a truly free government have come which will outlast the decay that has overthrown so many states. Comparative freedom may last for a time; but without the willingness to yield to sovereign law, no people will preserve for all time its liberties.

American government, both state and federal, is based on this ideal. While in other forms of government some one magistrate, or body of magistrates, presents in concrete form the incarnation of sovereign power, in America, the highest official is reminded on all occasions that he is the servant of the people, and a mere agent to discharge limited functions. The people of which he is the servant is not, however, in legal contemplation, a particular majority. The people, so described, is that ideal organization embracing both majority and minority, including in its powers and rights, as well the guaranteed rights to life, liberty and property of each individual against the rest of society, as those rights of control, over individual life, liberty and property, by organized society, when acting through constitutional agencies.

This people then, which is the American sovereign, finds its true expression in the definition, "The Law of the Land."

"The Law of the Land" is the sole and only supreme power in American polity.

This has been eloquently expressed by the United States Supreme Court, in the following words:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man, who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

Of this sovereign law the courts of the land are the voice and the hands.

A legislature may enact, but, if ignored, the statute is a dead letter until the courts have given it voice by their decisions and life through their processes.

When the judicial systems of the States and the United States were organized, after the close of the American Revolution, and our Constitution of popular government instituted, the statesmen of that age were profoundly alive to the necessity for checks and balances in government, and to the need for constitutional limitations, supported by an independent judiciary, in order to prevent our democratic governments from following in the footsteps of the experiments which had preceded them, and proving the truth of the "tyranny of majorities."

In the ninth paper of the Federalist that masterly series of essays on the science of republican government, the following principles are enunciated as those which should prevent the democratic governments of America from following in the footsteps of former democratic failures:

"The efficacy of various principles is now well understood which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding offices during good behavior; the representation of the people in the legislature by deputies of their own selection—these are either wholly new discoveries, or have made their principal progress toward perfection in modern times."

Madison in the same work, in contrasting a republican government with the above constitution, from an absolute democracy, says of the latter:

"Hence it is that such democracies . . . have ever been found incompatible with personal security or the rights of property."

The theory of our government therefore has placed upon the courts a function additional to that which pertains to the courts of countries which do not recognize that their legislative and executive branches, either singly or combined, are not sovereign in power, but are subject to constitutional limitations and act only as the agencies of the abstract sovereignty.

That additional function under our constitutional system is the duty, where a legislative act is challenged as not authorized by the Constitution, or as offending against some limitation or guaranty thereof, to decide if the legislative enactment is in reality the law or is in derogation of the Constitution—the highest law.

This power of the courts finds expression in the language of the Constitutions of a number of the States in the words, "Acts of the legislature in violation of this Constitution or of the Constitution of the United States are void, and the judiciary shall so declare them."

While the power to enact new laws rests in the legislature and the courts can only administer laws, and the adaptation of the scope of the government to advancing social conditions must rest with the legislature and their administration with the executive branch of government, this power conferred on the courts of passing upon the constitutionality of legislative acts, or of executive action in disregard of constitutional limitations, is the guaranty against the usurpation of power by the other departments of government or by the action of a majority of the voters, until the power is procured by the deliberate method of constitutional amendment, and constitutes the government a limited "government of laws and not of men."

It is by the preservation of the independence of the judiciary, and of its right to pass on these constitutional questions when raised that the substantial liberties of the country and of the individual citizen are to be maintained.

The happenings of the last decade and especially the relations of the government to private business during the late war have raised a series of problems that must be met and solved.

The doctrine of *laissez faire* has now but little place in our present view of the relation of government to the economic life of the nation.

The legislation—state and federal—regulating public utilities, their management and charges, and extending the control of the public over much business formerly considered wholly private—the laws regulating safety appliances, hours of labor, the employment of women and children—the provisions for the settlement of labor disputes, and many others, all assert a right of regulation in the public through governmental agencies and present a recurrence of cases for the decision of the courts, on the constitutional right of the individual to own and control his property subject to the right of eminent domain, on the one hand, and, on the other hand, the extent and limit of the police power of the state to regulate a business where it is claimed to have become affected with a public use, so as to protect the public.

The pressure of the settlement of the questions between capital and labor; a claim of the existence of a public interest in businesses, other than those styled public utilities, and of a consequent right of governmental interference in the handling of such business, in the amount of production and in the maximum prices, all show that the relation of proposed legislative regulation to the fundamental rights of private ownership and of labor, will present questions calling for the exercise of the function of the judiciary to sit as final arbiter between the rights of the public and of the individual.

To the sound decision of these questions the courts should bring an open mind recognizing the legitimate powers of the legislature to meet new conditions, produced by changed social relations, but at the same time they should approach the decision with an independence of control which will insure their giving full effect to the rights of the individual against an infringement of the constitutional guaranties of liberty and private property.

The growth in the last 20 years in the direction of direct action of the people in the enactment of laws and in matters of administration, is a subject which compels the attention of all observant persons.

The restiveness of the public to yield obedience to decisions of the courts which run counter to public opinion, and a demand for the reversal of such judgments, all show a tendency towards subordinating all branches of the government to the will of the passing popular majority.

The recent demand of the convention of a great interest that no court should have power to declare a legislative act unconstitutional, is a direct assertion that no check on the power of the majority save its own will, should prevail. This would convert the government, in a country where the majority has no check save the Constitution, into an absolute government, instead of a constitutional republic.

The more the power of action is conferred, or exercised, by direct vote of the people instead of by responsible representation, the greater becomes the necessity for upholding and securing the independence of the judiciary—state and federal—and of recognizing its right and duty, not only to decide on and uphold the constitutional powers of the government against attempts to prevent their proper exercise, but to protect the constitutional rights of individuals against all attempts to infringe them by improper legislation or illegal administrative conduct.

The reasons urged for direct action of the people in matters of legislation or as to legislative or executive officers, cannot apply to the judiciary or a judgment of a court. There the matter is either one strictly between private parties, or if there is a public interest involved in the cause, the public, as an interested party, cannot be a judge in its own cause, and therefore impartial judgment will be promoted by freeing the tribunal, as far as possible, from a right in the public to interfere with the final judgment, or to exert an influence upon the court.

If there is one thing more apparent today than another in America, it is the growing restiveness of majorities to recognize restraints of law against the doing of something greatly desired—and an unwillingness

to accord to minorities or individuals the right to insist on legal or constitutional restrictions on the desires of the majority.

If an individual resorts to the courts to test the right of the majority, there is a growing desire to deny him this right, and a wish to take from the court the power to arrest action in accordance with the popular will, until the question of right can be decided.

It is perfectly clear that any statute which would deny to an individual the right to a trial of his claim of right, or would permit the majority to pass judgment by acting in advance of decision, would but pander to the spirit of lawlessness, and would be a statute of tyranny, not of reform.

If the courts cannot interpose between the individual and a majority, however large, and effectively protect him in his rights of liberty and property, then there is no refuge in a democratic form of government. There is no balance of forces between the monarch and the majority. In a democracy these forces are the same. The courts alone can stand between personal or minority rights and popular power.

In such a state of society, forms framed for the protection of the individual and forms which enhance the respect shown for the courts, become invested with added significance.

The extreme importance of upholding the forms of law, in democratic governments, and the tendency to rebel against, and abolish them has been noticed by one of the closest observers of our American system.

Says De Tocqueville in his *Democracy in America*:

"Men living in democratic ages do not readily comprehend the utility of forms; they feel an instinctive contempt for them. I have elsewhere shown for what reasons. Forms excite their contempt and often their hatred; as they commonly aspire to none but easy and present gratifications, they rush onward to the object of their desires, and the slightest delay exasperates them. This same temper carried with them into political life, renders them hostile to forms, which perpetually retard or arrest them in some of their projects. Yet this objection which the men of democracies make to forms is the very thing which renders forms so useful to freedom; for their chief merit is to serve as a barrier between the strong and the weak, the ruler and the people, to retard the one and give the other time to look about him. Forms become more necessary in proportion as the government becomes more active and more powerful, whilst private persons are becoming more indolent and more feeble. Thus democratic nations naturally stand more in need of forms than other nations and they naturally respect them less. This deserves most serious attention. Nothing is more pitiful than the arrogant disdain of most of our contemporaries for questions of form; for the smallest questions of form have acquired in our time an importance which they never had before; many of the greatest interests of mankind depend upon them. I think that if the statesmen of aristocratic ages could sometimes condemn forms with impunity and frequently rise above them, the statesmen to whom the government of nations is now confided ought to treat the very least among them with respect, and not neglect them without imperious necessity. In aristo-

cracies the observance of forms was superstitious; amongst us they ought to be kept with a deliberate and enlightened deference."

The judges composing the court should not be regarded as the servants of the people, but as the servants of the sovereign law and as the arbiters between the claims of power and the limitations of the Constitution; as the guardians of the weak against the strong; of minorities against majorities; as the voice of sovereign law who will stand in the face of usurped power and say, "Thou shalt not," and who must therefore be made independent of the whims and passions of the changing majority.

In several crises of our national development, questions of re-adjusting the powers of the government to individual rights have called upon the courts to decide between the powers of government and the individual, and between those of the states and the union. After the adoption of the federal Constitution the decision of the courts gave vitality to the general government and established the structure of our present republic of republics.

At the close of the Civil War new questions of the relations of the general government to the states and to the citizen were presented and it was by the decision of the courts that these questions were settled, recognizing the enlarged sphere of federal control; but declaring a number of acts of Congress which infringed upon the rights of the states and of the individual unconstitutional.

It is not too much to say that the independent tenure of the judges rendering these decisions enabled them to rise above the passions and prejudices of the time and hold the balance of judicial determination true.

It is not to be expected that the activities of government will remain stationary and that new subjects will not be brought within the scope of governmental control or administration.

The complete dependence of communities on the production by some members of the necessities of life, and of the distribution of these necessities—the complexities of our growing population and social structure, all points in this direction. But all of this but emphasizes the importance of preserving an independent judiciary, who are secure against the attack of the passing prejudice of the moment and of preserving the forms of deliberate judicial procedure against those changes which under the excuse of mere speed are really a yielding to an instant demand for a denial of orderly and unprejudiced judgment.

In the coming adjustment of our problems of property, of industry, and of governmental control and individual rights, to the changing con-



ditions of the present day, we must not forget that while the settlement will be on the lines of the permanent advancement of society, it must be in accordance with our constitutional principles.

That as the courts of the country have in the past upheld the rights of government to develop such control of business as the growth of society required, it has done so in consonance with the principles of constitutional law and that the hope of the future lies in the upholding of the authority of, and of respect for, the law of the land as declared by the judgments of the courts.

Let the judges stand as much as the representatives of the law and as little as individuals, as is possible—the court, in session, is the embodied law and should be so regarded.

Let all reforms in legislation, aim at everything which will prevent any body of men from substituting violence for law, or from anticipating the judgment of a court by so-called popular action.

Let us steer in the true course—not such conservatives that we can see no defects in the old, and refuse to advance in the science and practice of law, abreast with the progress made in all departments of knowledge; but true progressives, in that we will hold to the good in the old, the we will revere the results of experience and the evolution of legal and governmental principles, that we will make our reforms *evolutionary* and not *revolutionary*, that we will recognize that no system of law is worthy of us that does not protect the freedom of the individual, as well as give scope to the power of government.

# SOUTHERN STORIES

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## COMES NATURAL

"I wonder why so many of the osteopathic doctors are women?"  
"Because women have a fondness for 'rubbing it in.'"

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## AUTO-INTOXICATION

"What was the excitement down the street?"  
"Oh, a man in a reverie ran into a woman in a tantrum."  
"Were the machines badly damaged?"

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## DOLLAR DIAGNOSIS

"Did the doctor know what you had?"  
"He seemed to have a pretty accurate idea. He asked for \$10 and I had \$11."

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## REASON ENOUGH

Susie: "Papa, what makes a man always give a woman a diamond engagement ring?"  
Her Father: "The woman."

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## MUST BE DR. CUPID

"I don't like your heart action," said the doctor, applying his stethoscope.  
"You've had some trouble with angina pectoris, haven't you?"  
"You're partly right, doc," answered the young man sheepishly, "only that ain't her name."

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## FAMILY BAROMETER

"What's that for?" said a mother to her son, who had just brought home a barometer.  
"Oh, it's a great idea, mother. Tells you when it's going to rain."  
"What's the use of wasting money on that when Providence has given your father rheumatics?"

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## MISLED

The Client: "I bought and paid for two dozen glass decanters that were advertised at \$16 a dozen, f. o. b., and when they were delivered they were empty."  
The Lawyer: "Well, what did you expect?"  
The Client: "Full of booze. Isn't that what f. o. b. means?"

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## KNEW WHAT IT WAS WORTH.

A newly appointed Florida judge had a "bootleeger" brought into his court and he was in doubt as to how much he should give him. He telephoned to one of his old colleagues and the following conversation took place:

"How much do you think I ought to give him," asked the young judge.  
"Not more than \$6 a quart and while you are about it get a couple of bottles for me," said the old judge.

## THE PSYCHOLOGICAL MOMENT

Lawyer Brandigen of Mississippi was a hard, stern man. He had a beautiful daughter of marriageable age who desired to hasten the day, despite a backward suitor. The lover was trembling—the girl urgent. He knew the music must be faced.

"Shall I ask your father for his consent tonight, darling?" he inquired.

"You had better," spoke up the small brother, unexpectedly from behind the sofa. "Pa's in his stocking feet."

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## LAWYER HIMSELF HOISTED.

A sharp tongued, red faced Memphis lawyer was cross-examining a witness as to his sobriety.

"You were seen," he began, "entering the Spread Eagle Cafe as soon as the doors were open or soon afterward?"

"Yes," replied the witness, "but not to drink."

"What object had you in view then?" asked the lawyer.

"The only object I had in view, sir, as I went in was yourself coming out."

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## KNEW FROM PERSONAL EXPERIENCE

A New Orleans capitalist some years ago undertook to open a moving picture plant. He had trouble in getting the animals to perform. He secured a colored man dressed up for a jungle scene, but the darkey was not strong going into the lion's cage. On being brought to the manager's office he was asked:

"Are you in the habit of handling animals? Have you had any experience?"

"Oh, yes sah, I'se a reglar lion man. I had a lot of 'xperience with lions."

"Here is what I want you to do. You are supposed to be sick in the hospital, and you are in bed, and your feet are sticking out, and the lion comes in and licks the soles of your feet."

The colored man said: "Which? Whose lion is goin' to lick whose feet?"

"Why, our old tame lion is going to lick the bottom of your feet."

"Say, boss, they ain't no lion goin' to lick my feet as long as they is in runnin' order."

"But yon don't understand, Mose. This lion is absolutely harmless. He is as gentle as a lamb. He was brought up on the bottle."

"Well, I'se just got one thing to tell you, boss, befo' I leave, and that is that Ah was brought up on the bottle myself, but Ah sure does eat meat now."

# TITLE AND ABSTRACT DEPARTMENT

**Frank C. Hackman, Editor in Charge**

## CONCERNING LIS PENDENS

In this article will be presented a discussion of the nature of the doctrine of lis pendens, and of statutes that have been enacted in some states requiring notices of lis pendens to be filed. The object is to show that these statutes are generally not as comprehensive as the common law or equity rule. Practically the doctrine of lis pendens is notice arising from pending judicial proceedings, and is comparable to notice imparted by recorded instruments. Hence, the subject is one of direct concern to abstracters, examiners of titles, and others.

The doctrine of lis pendens as to persons and property within its operation is that the court having jurisdiction of the suit or action is entitled to proceed to the final exercise of that jurisdiction, and that it is beyond the power of any of the parties to the action to prevent its doing so by any transfer or other act made or done after the service of the writ or the happening of such other act as may be necessary to the commencement of lis pendens. If any of the parties, after the lis pendens has become operative, attempts any transfer of the subject matter of the litigation, or to create any encumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action or suit may proceed without taking any notice whatever of such transfer, encumbrance or change in possession, and the final judgment or decree, when entered, may be carried into effect notwithstanding the attempted dealing with the subject matter thereof. The effect of the lis pendens is to keep the subject matter of the litigation within the control of the court, and render the parties powerless to place it beyond the reach of the final judgment. One acquiring an interest pendente lite is sometimes, on his application, permitted to appear in the action and defend or prosecute in the place of the person to whose interest he has succeeded. The court is not, however, bound to permit him to do so, in the absence of a statute conferring upon him this right. Whether, however, he appears in the cause or not, and whether he has any actual notice of its pendency or not, the judgment, when rendered, must be given the same effect as if he had not acquired his interest, or as if he had been a party before the court from the commencement of the proceeding. His interests are absolutely con-

cluded by the final determination of the suit. (*Roberts v. Cardwell*, 154 Ky., 483, 157 S. W. 711, *Ann. Cases*. 1915 C 515.)

The doctrine of *lis pendens* is equally applicable to actions at law as well as to suits in equity,—to judicial proceedings of every kind affecting real property. (*Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28.)

It may be remarked that the doctrine is also applicable to personal property, but its operation in that respect will not be touched upon in this article.

The operation of the doctrine territorially is co-extensive with the territorial jurisdiction of the court. If the jurisdiction be a county then a litigation operates to make a *lis pendens* effective throughout the county. Or if the jurisdiction of the court extends throughout a district, as does that of a federal court, a *lis pendens* operates throughout the district without respect to county lines. (*Stewart v. Wheeling, etc., R. Co.*, 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.)

Courts have asserted two different theories as to the basis of the rule. One is that the rule is founded upon constructive notice in that a pending action operates as constructive notice to the world, and any one dealing with property while litigation affecting it is pending, is bound by the result of it, because he is charged with notice of the proceeding. (*Bridger v. Exchange Bank*, 126 Ga., 821, 56 S. E. 97, 115 Amer. St. Rep. 118, 8 L. R. A. N.S. 463.) Under this theory the effect of *lis pendens* and the effect of registry are in their nature the same thing. They are only different examples or instances of the operation of the rule of constructive notice. They are record notices. One is a record in one place, and the other a record in another place. A purchaser must consult both places of record for light and information. (*Jones v. McNarrin*, 68 Me. 28 Amer. Rep. 66.) The other theory is that the rule is not founded upon constructive notice, but upon public policy. It is the view of the courts adhering to this theory that the necessities of mankind require the decision of a court in an action shall be binding, not only on the parties to it, but also on those who derive any title or interest through or from them while the action is pending, whether the latter had or had not notice of the pending proceedings. Otherwise a plaintiff would be liable in every case to be defeated by the defendant's sale or mortgage before judgment or decree, and would be compelled to commence proceedings anew, subject again to be defeated by the same course of action, and so interminable litigation might and would be the consequence, and it would be impracticable for a man to secure his rights by a resort to the courts. (*Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97, 115 Amer. St. Rep. 118, 8 L. R. A. N. S.

463; *Bellamy v. Sabine*, 1 *De Gex. J.* 566; *Hailey v. Ano*, 136 *N. Y.* 569, 32 *N. E.* 1068, 32 *Amer. St. Rep.* 764; *Turner v. Houpt*, 53 *N. J. Eq.* 526, 33 *Atl.* 28.) But whether the rule is based upon the one theory or the other the result is the same, for one acquiring any title to or interest in property that is the subject matter of a pending action from or through a party to it, is bound by the judgment or decree that may be rendered therein. (*Noyes v. Crawford*, 118 *Ia.* 15, 91 *N. W.* 799, 96 *Amer. St. Rep.* 363). If, however, the rule be considered as based solely on constructive notice, express or implied, it would be impossible to make the rule applicable to many cases where no notice existed to charge a party therewith.

At common law a *lis pendens* commences the first moment of the day on which the summons issues and bearts test. In equity a *lis pendens* begins from date of service of the subjoena after the bill is filed; but it exists from the date of service of the subpoena although the bill be not filed until some subsequent date. A *lis pendens*, therefore, becomes effective on the filing of the bill as of the date of the service of the subpoena, if it has been previously served, and binds a purchaser or other party dealing with the property subsequent to the service of the subpoena and before the filing of the bill. (*Newman v. Champman*, 2 *Rand.* 93, 14 *Amer. Dec.* 766; *Bridger v. Exchange Bank*, 126 *Ga.* 821, 56 *S. E.* 97, 11 *Amer. St. Rep.* 118, 8 *L. R. A. N. S.* 463; *Farmers' Loan etc., Co., v. Lake St. E. R. Co.*, 177 *U. S.* 51, 20 *Sup. Ct.* 564, 44 *L. Ed.* 667; *Reid, Murdock & Co. v. Sheffly*, 75 *Ill.* 136.) A party, therefore, could be bound by a *lis pendens* though there would be nothing upon the records of the court which would afford notice of the pending litigation or the property affected. In some states statutes have been enacted declaratory of the common law rule. In other jurisdictions, either by reason of legislative enactments or by judicial construction, the common law rule has been modified as as to require the complaint or bill to be first filed and the summons or subpoena thereafter served in order to create a *lis pendens*. Where this is so there exists a source of information as to an action or suit, and the unnecessary hardship of the common law rule above mentioned is obviated. (*Walker v. Goldsmith*, 14 *Ore.* 125, 12 *Pac.* 537; *Leitch v. Wells*, 48 *N. Y.* 585.)

The filing of a formal notice was not required by the common law or equity in order to create a *lis pendens*. The doctrine is harsh in its operation when applied to cases where the subject of litigation has been purchased in good faith, without actual knowledge or notice of the pendency of the suit. This has led to the enactment of statutes in many states providing for the filing or recording, or both, of formal

notices of lis pendens in some particular county office. (*Wood v. Price*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. N. S. 772, Ann Cas. 1913 A 1210; *Empire Land, etc. Co. v. Engley*, 18 Col. 388, 33 Pac. 153.) Their purpose is to assimilate the law of lis pendens to the registration laws, and the docketing of judgments, and to produce consistency and certainty in the doctrine of constructive notice, and to afford a convenient and effectual method for enforcing the common law rule. (*Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *McVay v. Tousley*, 20 S. D. 258 105 N. W. 932.) However, as will be hereinafter shown, the assimilation is generally but partially accomplished.

These statutes have been regarded as limiting rights that previously existed. They add to the common law rule the requirement for constructive notice, not only of a suit, but filing notice of it. (*Richardson v. White*, 18 Cal. 102.) In consequence they make the doctrine of lis pendens an element of the law of notice, since they make notice the channel or means through which, or by which, the real object and purpose of lis pendens is attained. (*McWhorter v. Brady*, 41 Okla. 383, 140 Pac. 782.) Thereby they abrogate the rule making mere pendency of an action constructive notice, but do not change the law as to actual notice. As to all persons who have actual notice or knowledge of the action, though no notice is filed, the rule of lis pendens remains applicable to them. (*Sampson v. Ohleyer*, 22 Cal. 200; *Wood v. Price*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. N. S. 772, Ann Cas. 1913 A 1210.)

Where the filing of a notice is not required, in the absence of other statutory regulations, the common law or equity rule itself prevails. (*Rothschild v. Leonard*, 33 Ind. App. 452, 71 N. E. 673; *Brown v. Cohn*, 95 Wis. 90, 69 N. W. 71, 60 Amer. St. Rep. 83.)

The statutes do not create the law of lis pendens in the states where operative, and where the statute has no negative words or repealing clause, it is supplemental to the common law or equity rule and does not repeal it, so that the latter will govern in all cases not covered by the statute. (*Bell v. Petterson*, 105 Wis. 607, 81 N. W. 279; *Brown v. Cohn*, 95 Wis. 90, 69 N. W. 71, 60 Amer. St. Rep. 83.) The statutes are to be construed with reference to the pre-existing equity rule and the reason and principle behind it, even in case the language used by the legislature is broader than the rule laid down in the decisions of the court. (*Merrill v. Wright*, 65 Nebr. 794, 91 N. W. 697, 101 Amer. St. Rep. 645.)

These notices of lis pendens statutes vary in their provisions, scope and effect. In a given state there may be special statutory requirements as to filing notices of lis pendens with respect to specific sections. Or in a particular state, as in Michigan, one statute may provide for

filing of notices of suits in chancery, and another statute for notice of action in ejectment. (*Howell's Mich. Stat.*, secs. 11958, 13209.) And in one jurisdiction the notice must be filed and recorded under the terms of one section of the code, and indexed under some other section.

In some jurisdictions the required notice need be filed only to make a *lis pendens* operative as to bona fide purchasers and incumbrances. As to all who are not of that class the common law rule applies and the filing of a notice is not necessary to bind them. So where it is necessary that notice be filed in order to impart constructive notice to bona fide purchasers or mortgagees the filing of a notice is not necessary to bind creditors. (*Dunning v. Crane*, 61 N. J. Eq. 634, 47 Atl. 420.) And it has been held that the purchaser of a tax certificate or tax title is not a bona fide purchaser since he buys under the rule of *caveat emptor*, subject to the infirmities of his title, knowing such title grows out of proceedings hostile to the real owner, and that such title is liable to be defeated by whatever irregularities or omissions may be in the proceedings. Hence the filing of the notice required to bind bona fide purchasers or incumbrancers is unnecessary to conclude a tax purchaser. (*Brown v. Cohn*, 95 Wis. 90, 69 N. W. 71., 60 Amer. St. Rep. 83.) These acts abrogate the rule that parties to a litigation can not alienate the property in dispute as against the rights of the opposing parties to the suit. They make recording of notice necessary to preserve the former effect of the litigation, so that the result of omitting to file and record the statutory notice leaves the parties free to deal with the subject matter of the litigation untrammelled, and any one acquiring an interest therein *pendente lite* is unaffected by it, provided his acquisition was made bona fide, without notice. (*Wood v. Price*, 79 N. J. Eq. 620, 81 Atl. 983, 38 L. R. A. N. S. 772, Ann Cas. 1913 A 1210.)

In some jurisdictions the filing or recording of *lis pendens* notices is required only in respect of certain classes of actions or suits, and in such cases all other actions and suits are governed by the common law or equity rule. So where a statute provides for the filing of notices of actions affecting the title to land, it does not apply to actions concerning the possession of land, and such a statute has been held, therefore, not applicable to actions of ejectment as they do not affect title but possession. (*Long v. Neville*, 29 Cal 132.) Suits to enforce tax liens have been considered not to be governed by statutory provisions as to notices of actions affecting real property, because the assessment and levy of taxes are matters of record established by law, of which all persons are conclusively presumed to have notice, and such suits are



but a method of making such assessments and levies effective. Nor does such statute apply to suits to foreclose tax liens commenced in the name of the sovereign authority, for it is not bound by statute unless named therein. (*Reeve v. Kennedy*, 43 Cal. 643; *Wright v. Walker*, 30 Ark. 44; 56 Amer. St. Rep. 856, note.) And it has been decided that no notice need be filed as to actions strictly in rem, for the court, by sequestration of the property in such actions, renders it impossible for any one to buy pendente lite, and yet claim to be a good faith purchaser. (*Buxton v. Sargent*, 7 N. D. 503, 75 N. W. 811.) There are possible instances where the statute may be inapplicable to a proceeding in a state court though it be the class covered by the statute. Thus, where an act of Congress authorized proceedings in a state court to determine adverse claims to public lands, it was held that such proceedings were effective as lis pendens upon doing all the acts prescribed by Congress, though notice of lis pendens had not been filed as prescribed for other proceedings affecting title to real estate. (*People v. El Paso etc., Court*, 19 Col. 343.) A requirement of a record lis pendens notice of "the pendency of an action, suit, attachment, or proceedings to subject real estate to the payment of any debt or liability" does not include and make necessary the record of notice of an action to set aside a deed as fraudulent and void. (*O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276). And notice of an action to enforce a mechanic's lien need not be filed, since the notice of the lien suffices. (*Empire Land and Canal Co.*, 18 Col. 388, 33 Pac. 153).

Where it is provided that from the time of filing of notice only shall a purchaser or incumbrancer of the property affected be deemed to have constructive notice of the pendency of the action, the filing of such notice does not affect the holder of an unrecorded conveyance made before the commencement of the action for he is not a purchaser pendente lite. (*Warnock v. Harlow*, 96 Cal. 298, 31 Pac. 166, 31 Amer. St. Rep. 209). And the notice may not affect prior rights, as where the property has been sold under an executory contract of sale prior to the filing of lis pendens. The purchaser is protected in the rights already acquired, but the lis pendens affects him as to subsequent payments. (*Moulton v. Kolodzik*, 97 Minn. 423, 107 N. W. 154, 7 Ann. Cas. 1090.) But some statutes expressly provide that every person whose conveyance or incumbrance is executed or recorded subsequently to the filing of the notice shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action. Such statutory provisions are broader than the common law or equity rule by

which a *lis pendens* did not operate upon prior conveyances of incumbrances or antecedent equities.

Where the notice must be filed with the clerk of the court of the county wherein the land affected is situate, it has been held that it is not necessary to file such notice in respect to an action brought in the county where the land lies, when the pleadings contain "the names of the parties, the object of the action, and the description of the property." This for the reason that the pleadings in such case substantially comply with the statutory provisions as to contents and filing of notice, and put them in operation. And since the notice under the statute should be filed with the clerk of the court, and the place of filing would be with the pleadings in the action, the filing of a notice would not avail more than the pleadings. Under the statute it is only necessary to file the notice in the clerk's office in counties wherein part of the land in litigation is situate, other than the county where the action is brought. (*Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868).

It has been said the filing of a notice is notice to the world, and whoever thereafter deals with the property takes with constructive notice whether he has ever seen or heard of the *lis pendens* or not. (*Heim v. Ellis*, 49 Mich. 241). But this statement is too broad. A statutory notice is constructive notice to those charged with notice of it under the statute. All others are bound by the common law rule.

Under a statute making a *lis pendens* operative from the time the notice is filed, its effect as notice will continue notwithstanding any loss or destruction of the notice filed, or any failure of the record from accidental or other reasons to give the desired information, or by reason of the fact it has not been indexed. (*Heim v. Ellis*, 49 Mich. 241; *Pope v. Beauchamp*, 206 S. W. 928).

A statutory notice does not give constructive notice of a claim as does a recorded deed or mortgage, nor of anything more than the pendency of the action. When the action has ceased to be pending under the law of *lis pendens*, the statutory notice ceases to be effectual for any other purpose. It does not constitute such notice of a plaintiff's equity as would effect the conscience of a purchaser. (*McVay v. Tousley*, 20 S. D. 258, 105 N. W. 932, *Amer. St. Rep.* 927). And the notice does not affect independent parties asserting adverse rights. (*Becker v. Howard*, 4 Hun. 359, *aff.* 66 N. Y. 6). It may be remarked that the statutes with respect to *lis pendens* operate upon real property or some interest therein, and do not apply to personal property. And they have no application to litigation affecting real property conducted in the federal courts. (This latter matter was the

subject of an article in the March-April issue of the *THE LAWYER AND BANKER*, and, therefore, not touched upon here).

From what has been said about the nature and character of the statutes under consideration, it becomes apparent that they are not generally all comprehensive. They do not embrace in their scope the whole doctrine of *lis pendens*, nor repeal it. The latter remains in full force and effect save as modified or in part abrogated by the particular statute. If it be considered that the provisions for filing or recording, or both, of formal notices of pending litigation were enacted with a view to assimilating the law of *lis pendens* so far as it relates to real property, to the recording system, it may be well observed that generally they have not fully effected that result. Save as to parties and the class of actions to which a particular statute is applicable, the commencement of a suit operates as a *lis pendens* under the primary rule.

In states where *lis pendens* statutes are in force, those who, in making an abstract, certificate or report, rely upon finding formal notices of *lis pendens* on file in the office of the recorder, register, or other county record office in which such notices are required by the statute to be filed, do not adopt a safe basis for the ascertainment of judicial proceedings affecting real property. This is clearly manifest from what has been said.

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#### COMMENTS ON ABSTRACT TOPICS

An abstract of title has been said to be a condensed history of the title to land to which it refers, and to be a synopsis or summary of all records which evidence the initiation and transmission of the title, and the creation of incumbrances upon it, or in anywise affect it, so that from an examination of the abstract the ownership and condition of it may be ascertained. But abstracts are not made conformable to such standard in all localities. In some counties an order for an abstract is complied with by merely furnishing a list of the matters that affect the title. This list as to instruments will only give the names of the parties, dates of execution and record, volume and page of record, and description of the premises. Other matters will be similarly referred to. This kind of abstract is used by whoever examines the title as an index to the records which are examined and the opinion based thereon. Such an abstract has only a local use.

In other localities an abstract will begin with a certificate setting forth that on a stated date a named person was owner in fee of the premises free of incumbrance or subject to incumbrances, as the case may be. All record matters subsequent to that date will be abstracted as customary.

In some places abstracts contain what are opinions instead of a presentation of the facts. Acknowledgments may be noted thus: Properly

acknowledged. A summons and proof of service be merely set forth thus: Summons served on John Doe, Mary Roe and others named. Abstractors who give opinions and not facts step outside of the functions of the business.

A form of abstract certificate highly recommended by some individuals is quite an oddity when analyzed. The body of this certificate reads: "That said abstract correctly shows all matters affecting or relating to the said title which are of record or on file in said county, including conveyances, deeds, trust deeds, land contracts, incumbrances, mortgages (satisfied or unsatisfied), mechanics' or other liens, attachments, unsatisfied judgments in United States and State courts, suits pending, tax sales, tax deeds, probate proceedings, special proceedings and transcripts of judgments from United States and State courts; that said abstract also shows all bankruptcy proceedings and certified copies of orders of adjudication and orders approving bonds of trustees in bankruptcy proceedings by or against 'name of record owner,' or any party who within one year last past has been an owner of record of said land; and that all taxes and special assessments for the year — and all prior year are paid in full."

This form of certificate strikingly possesses verbosity and redundancy.

There is no virtue in the use of the word "correctly" therein. It is a needless affirmation. If a necessary assertion, then it would likewise be necessary to affirm that the examination of the records had been "correctly" made, or it should be assumed such was not the case in the absence of that statement.

It is not material to the value of a certificate. The abstracter might just as well certify to his possession of knowledge and skill, and that he exercised the same with care in compiling the abstract.

The certificate affirms that the abstract "shows all matters affecting or relating" to the title "which are of record or on file in said county." That is a comprehensive statement. Standing alone, it would be all inclusive of everything the county records or files contained with respect to the title concerned. That being true, why numerate not only certain classes of matters, but certain kinds also? Thus the word "conveyance" is a comprehensive word. It includes many kinds of instruments. But that fact is ignored and instruments that are within its scope are enumerated. So there are specified conveyance deeds, trust deeds, tax deeds. The last three are conveyances, and they are also deeds. A needless repetition. Where mortgages operate otherwise than as liens, they too are conveyances.

Again note specified "incumbrances, mortgages (satisfied or unsatisfied), mechanics' liens and other liens." Here again is needless repetition. The word "incumbrance" is a generic word. It is comprehensive. Mortgages and liens are incumbrances, and a mortgage is in many States a lien.

When it is certified that an abstract shows all matters affecting or relating to the title which are of record or on file in a county, and thereto is added "including conveyances, deeds," and other enumerated specific

kinds of instruments and matters, it may be well assumed that any that are not enumerated are not shown. Otherwise expressed, the specifications are exclusive of classes and kinds not named. Hence, it becomes necessary to scrutinize the list of matters to ascertain which ones are not specified that may be of record. There are many such, but of these, for illustration, there may be noted assignments and satisfactions of and agreements with respect to mortgages, leases and assignments, and releases thereof, easements, declarations of homestead, powers of attorney, lis pendens, etc.

A certificate of the kind in question,—one that enumerates both the class and kind of matters the abstract purports to show,—is not susceptible of universal use as a fixed form, for the very simple reason it includes matters not universally required or permitted to be recorded, or not universally available. Land contracts are not everywhere recordable. Judgments in United States courts are not records accessible to abstracters in counties other than those wherein those courts are located. And the terms used in the certificate have no uniform significance. Thus, in the certificate "probate proceedings" and "special proceedings" are enumerated as separate matters, whereas, in some jurisdictions, a probate is a special proceeding. So, also, in some jurisdictions there is no authority for filing in county offices transcripts of judgments rendered in the United States courts, and in such cases the statement relative thereto in this certificate would be an absurdity.

A peculiar feature of this certificate is that it is an affirmative statement that the abstract shows all matters of record or on file in the county, including conveyances, deeds, and all the other enumerated matters. It is not qualified or conditional. It is not a statement that these matters, if any there be, are shown; but, on the contrary, a positive assertion that they are shown. As a matter of fact, there are many titles that are not and never have been affected by, trust deeds, land contracts, mechanics' liens, judicial proceedings, judgments, etc., and the certificate would not be applicable in such instances.

The recording system is wholly created by statute. If it is at all advisable to specify in a certificate the matters for which a search has been made, then, to be exact, it is necessary to search the code of the State wherein the land lies, and to ascertain therefrom the matters therein specified as required or permitted to be recorded, and to use the statutory designations thereof.

But that will not effect any better or more certain or satisfactory result than will be obtained by certifying that the abstract shows all matters of record or on file in the record offices in the county. These latter are definite and positive points to tie to. Instruments are numerous and designation by class or kind difficult.

The certificate referred to may have merit, but if so, it is relative. As a matter of fact, the value of an abstract is more often to be determined by the knowledge and skill of the compilers than by what the certificate to the abstract states. Some make better abstracts than the certificates they affix give assurance of.

The opinion seems to be prevalent that one who renders service as an agent is not liable in damages for mistakes he may make detrimental to his principal or employer if the services were rendered gratuitously. That opinion has no basis in law. On the contrary, in employments like that of abstracting titles requiring special skill, an agent who professes or holds himself out as possessing such skill will be liable for losses due to his failure to possess or exercise the same, even if the agency is gratuitous.

It should also be remembered that an employer, whether an individual or a corporation, habitually permitting an employee dealing with his or its patrons to express opinions and to advise them respecting matters, is liable in damages to them for losses suffered through reliance upon an opinion or advice given without requisite knowledge and skill concerning the subject. Habitual conduct prevents denial of agency and authorization. In the picturesque language of the day, it is better to "can ignorant chatter." Ever-ready, ill-advised opinions hinder development of confidence and respect.

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### AN IMPORTANT FEDERAL BILL

It is a fundamental principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own or in any other courts, without its consent. It is based upon reasons of public policy arising from the inconvenience and danger that would be incurred from a contrary rule. It is a rule of the common law recognized and applied to the United States, and without respect to suits against the government directly or against its property. The exemption of the federal government cannot be waived by one of its officers, nor can a state enact a law making it suable in a state court that would be valid. Congress alone has the power to waive this exemption of the federal government, and it has been waived by Congressional acts with respect to particular matters. Since permission to sue the United States is absolutely and wholly within the discretion of the Congress, it may impose upon any consent it may give such terms and conditions as it may see fit, the manner in which a suit shall be conducted, and specify the cases and contingencies in which the liability of the government may be submitted to the courts for judicial consideration, and Congress can withdraw the permission at its will. The right to sue when granted is limited to the cases, both in regard to parties and the cause of action, prescribed by the act. An action against the federal government must be within the terms of some Congressional act, else the court is without jurisdiction.

Congress has authorized the United States to be made a party defendant in suits for partition of lands in which it has an interest. This act provides that district courts shall have jurisdiction "Of suits in

equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate". *Act May 17, 1898, c. 339, sec. 2; U. S. Comp. St. 1916, sec. 991-25.*

"When such suit is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of the same by registered letter to the Attorney-General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service, and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the Government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer or demurrer on the part of the Government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property or any part thereof the Attorney-General of the United States may, in his discretion, bid for the same in behalf of the United States. If the United States shall be the purchaser, the amount of the purchase money shall be paid from the Treasury of the United States upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney-General". *Act May 17, 1898, c. 339, sec. 2; U. S. Comp. St. 1916, sec. 1579.*

This is the only statute permitting the United States to be made a defendant in an action that concerns real property in which the United States has an interest.

These matters have been mentioned in order to emphasize the importance of a bill now before Congress which, if enacted, will permit the United States to be made defendant in certain classes of cases wherein it cannot now be made such.

The bill referred to has been, at the request of Mr. Henry R. Chittick, solicitor for Lawyers Title and Trust Company of New York City, introduced in the United States Senate (*Senate Bill 3224*) by Senator Calder of New York, and in the House (*House Bill 11006*)

by Representative Graham of Philadelphia, Pa. Either bill reads (omitting title and enacting words) as follows:

"That the United States of America may be made a party defendant in the same manner as a private person in any action for the foreclosure of a mortgage or other lien on real property, or for partition of real property, or in any action in any other manner affecting title to real property where the United States of America have, or claim to have, or may have a lien on such real property.

"SEC. 2. That such action may be brought in any State or Federal court having jurisdiction of the subject matter of such action in the State, Territory or District where the real property affected thereby or any part thereof is situated.

"SEC. 3. That in such case the complaint shall set forth in addition to all other matters required by law detailed facts showing the particular nature of the lien on the said real property of the United States of America, and the reason for making the United States of America a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the United States of America.

"SEC. 4. That in such a case the summons and copy of the complaint must be served upon the Attorney-General or upon the United States district attorney for the district in which such real property is situated, who must appear in behalf of the United States of America.

"SEC. 5. That if any such action is brought in any State court, any Federal court having jurisdiction of the subject matter of such action in the district where the real property affected thereby is situated shall have power upon motion of the United States district attorney to remove such action from the State Court in which it is brought to such Federal court without prejudice to any of the proceedings theretofore had in the State court. Upon the entry of such order of removal a certified copy thereof shall be filed in the office of the clerk of the State court in which the action was commenced, which shall require such clerk to transmit to the clerk of the Federal court all papers filed in his office in such action. Thereafter such action shall be prosecuted in the Federal court to which it is removed with the same force and effect as if originally brought therein: Provided, however, That if such removal is made before all of the defendants have appeared or answered and whether their time to appear and answer has expired or not, no judgment shall be entered against such non-appearing or non-answering defendants until after summons issued out of such Federal court has been served upon such defendant as required by the rules and practice of the Federal court.

"SEC. 6. That this Act shall take effect September 1, 1922.

This bill was referred to the judiciary committees of the House and Senate.

By the provisions of this bill it appears that its enactment would permit the United States to be made a defendant in certain classes of cases, to-wit: mortgage or lien foreclosures, suits for partition, or actions in "any other manner affecting title to real property," and furthermore, even in all these cases, only where the United States "have, claim to have or may have a lien" on the real property involved. If the United States were a tenant in common or joint tenant, or had any interest in the real property other than that of a lienor, this bill, if a law, would not permit the United States to be made a defendant in any of the suits specified in the bill. It is apparent it in no wise repeals, modifies or affects the existing law above mentioned, touching upon partition in cases where the United States is a tenant in common or joint tenant.



The usefulness of this bill is suggested when it is considered what a large number of people are within the scope of and subject to federal taxation, and that failure to pay a tax creates a lien on the tax-debtors property or whatever interest he may have in land. If, for example, the tax-debtor owned land subject to a mortgage and subsequent to the execution of the latter a tax lien attached to the land, a foreclosure of the mortgage would not affect the tax lien though it be subordinate to the mortgage, and though the land be worth and sell for the value of the mortgage only. The United States could not be made a party to such suit. All the complex issues that arise with respect to liens generally and which may be determined by judicial proceedings can arise with respect to liens in favor of the United States. But issues involving the latter cannot be judicially settled where their determination necessitates the United States being made a party to an action. This bill would make it possible to do so.

The bill has merit, will serve a useful purpose, and, we apprehend, can create no situation which is sought to be avoided by the exemption of the government from being sued. The bill, as worded, does not propose to permit suits against the government touching its property. It proposes to permit the government being made a defendant in certain cases as to property upon which the government has or claims to have a lien, and hence in cases involving private property only.

It may be necessary in order that the interests of the government be protected, that some provision be made for purchase of property as in cases of foreclosure, partition, and the like where a sale is or may be made, like the provision therefor in cases of partition under the act above quoted.

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#### ODDS AND ENDS

Title insurance originated in the United States in 1876. As a contract it is interesting to note that another kind of property insurance, that of fire, originated in very ancient times. It is said to have flourished in the towns and districts of Assyria and the East over 2500 years ago. Judges, priests and magistrates were appointed for each town or district with power to levy contributions from each member of the commune to provide a fund to be used for emergencies, such as drought and fire. When a fire occurred, if the judges were satisfied it was accidental, they empowered the magistrates to assess the members of the commune, either in kind or money; and if by reason of poverty any member was unable to provide his share of the levy, it was made up from the common fund. The first title insurance company was organized at Philadelphia in 1876, and the first fire insurance company in the United States was also organized at that city on April 13, 1730. The latter company was generally known as the Hand-in-Hand, its house-mark being four hands clasping

wrists. The first fire insurance company in New York was organized April 3, 1787, and in England in 1710, which company still exists.

At the close of the Civil War in the United States the negroes in the South were imbued with the notion that each negro family would be given "forty acres and a mule." This made them easy victims of sharpers. One such sold a negro a deed reading: "Know all men by these presents, that a nought is a nought and a figure is a figure; all for the white man and none for the nigger. And whereas Moses lifted up the serpent in the wilderness, so also have I lifted this d——d old nigger out of four dollars and six bits. Amen! Selah!" (United States in Our Own Times, by Haworth.)

A Spanish grant of land made in 1739 reads in part as follows: "Possession.—In the new settlement of 'Nuestra Senora de la Concepcion de Thomi Dominguez,' instituted and established by Don Gaspar Domingo de Mendoza, actual governor and captain-general of this kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty-nine, I, Captain Juan Gonzales Baz, senior justice and war captain of the town of San Phelipe de Albuquerque, and the districts within its jurisdiction, by virtue of the decree issued and above provided by said governor, the royal possession ordered to be given being published and promulgated, and the parties concerned being together, I proceeded to the above mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in that settlement, which bears the aforementioned, of 'Nuestra Senora de la Concepcion de Thomi Dominguez,' whose titular feast they promised to observe and celebrate each year. And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition, which are as follows (describing them): "and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them as I do direct them, to settle the same within the time prescribed by the royal ordinances," etc.

A grant of land in Maryland in colonial times began as follows: "A grant of date September 30, 1724, by Benedict Leonard Calvert, Lord Proprietary. Maryland, s't: Charles, absolute lord and proprietary of the provinces of Maryland, and Avalon, lord baron of Baltimore, etc., to all persons to whom these presents shall come, greeting in our Lord God Everlasting: Know ye that for and in consideration that," etc.

In New York it is provided by statute that "a recording officer shall not record or accept for record any conveyance of real property executed subsequent to September 30th, 1910, unless the residence of the purchaser, and if in a city of over five hundred thousand inhabitants according to the last federal census the street number of the residence of the purchaser shall be stated therein, and such residence and street number

shall be recorded with the conveyance. After May 1st, 1914, a recording officer shall not record or accept for record any conveyance of real property executed subsequent to said May 1st, 1914, if in a city of over two hundred thousand inhabitants according to the last federal census, unless the street number of the residence of the purchaser shall be stated therein, and such residence and street number shall be recorded with the conveyance." (Birdseye, C. & G.'s Consol. L. N. Y., 2 ed., vol. 7, sec. 333.) The word "conveyance" is defined by statute in that state as including every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien, except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

In the American colonies in the seventeenth century land was sold to settlers at 50 cents per acre in Maine, 60 cents per acre in the New England colonies, Pennsylvania, Delaware, and Virginia, and at 40 cents per acre in the southern colonies, and upward.

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## STATE STATUTES AFFECTING ABSTRACTERS AND INSURERS

It would seem not unprofitable to those engaged in the title business to have some idea of what statutory provisions have been enacted in other states than their own with respect to the business. Hence, the statutes of various states are quoted in full or summarized and here presented. Lack of uniformity is noticeable, and rather odd features are incorporated in some of the statutes.

Tennessee.—There are special statutory provisions in this state for the incorporation of companies for the purpose of "making and furnishing abstracts." Five or more persons may form a corporation for that purpose, with such capital stock as they may elect. The corporation will possess certain corporate powers under the general law, and, besides, is specifically authorized "to construct upon its own real estate, and operate, or lease and operate a vault for the safe-keeping of valuables, such as money, coin, notes, bonds, jewelry, deeds, contracts, books, records, etc., and shall have the right to sublet same, or rent out compartments, boxes, etc., in said vault for the safe-keeping of valuables, \* \* ." (*Shannon's Code*, sec. 2077, 2077 a 1).

Bank and trust companies are empowered "to guarantee the payment of bonds and mortgages owned by other persons, or to guarantee titles to real estate for a consideration to be agreed on by the parties." (*Shannon's Code*, sec. 2099).

New York.—In this state, five or more persons may form a corporation “to examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, \* \* and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon, which shall be known as a title guaranty corporation,” under the insurance code. No title guaranty corporation shall be formed with a smaller capital than \$150,000, divided into shares of \$100 each. Every such corporation shall set apart a sum of not less than two-thirds of the amount of its capital stock as a guaranty fund, and shall invest the same in the kinds of securities in which it is permitted to invest its capital. And no such corporation shall issue any guaranty or policy of insurance “to owners of real property and others interested therein against loss by reason of defective titles and other incumbrances, until such sum has been so set apart and invested.” (*Birdseye C. & G. Consol. Laws N. Y., secs. 170, 176*).

Searches affecting property situate in any county in which the office of county clerk or register is a salaried one, when made and certified to by title insurance, abstract or searching companies, organized and doing business under the laws of the state, may be used in all actions and proceedings in which official searches may be used, in place of and with the same legal effect as such official searches. (*Birdseye, C. & G. Consol. Laws N. Y., vol. 10, sec. 182-a*). . . . .

Texas.—In this state title insurance is governed by the insurance code. By its terms three or more persons may form a corporation “to insure against loss or damage or account of circumstances [incumbrances] upon or defects in the title to real estate.” A company must have not less than \$100,000 capital stock subscribed, and paid in, in cash. The capital stock may be invested in specified securities, and \$50,000 of it, in cash or securities, must be deposited with the State Treasurer. (*Texas Stat. 1920, art. 4942 a-j, and art. 4942-e*).

Maine.—Title insurance is governed by the provisions of the insurance code. Ten or more persons, residents of the state may organize a corporation “to examine titles to real estate and personal property, furnish information relative thereto and insure owners and others interested therein against loss by reason of incumbrances or defective titles.” A company must have not less than \$100,000 capital. A foreign title insurance company, in order to do business in the state, must have \$250,00 “paid-up capital exclusive of any obligations of the stockholders of any description, well invested in or secured by real

estate, bonds, stocks or securities other than names alone." Title insurance companies must annually pay a tax upon all premiums received, whether in cash or in notes absolutely payable, on contracts made in the state, at the rate of  $1\frac{1}{2}$  per centum per year, provided, however, that no tax shall be required on account of any premium paid on policies of insurance on farm property. *Rev. St. Me.*, 1916, *secs.* 55, *p.* 860; *sec.* 145, *p.* 887; *sec.* 49.

Utah.—"Every person desiring to open and conduct an abstract business shall, before entering upon such business, make application for a license to the board of county commissioners of the county in which he proposes to conduct such business. Said commissioners shall, if they deem said applicant a proper and competent person, issue a license authorizing said applicant during all reasonable business hours and under the authority of the county recorder to have free access to said records; provided, such license shall not issue until said applicant shall file a bond with approved securities in the penal sum of not less than ten thousand dollars, conditioned for the faithful abstracting of said records and the issuing of correct abstracts of title. Said bond shall also provide that the said person, his agent or employee shall be held liable for any mutilation of the records in his possession. Every person conducting an abstract business shall be liable to the person aggrieved for mistakes and errors in abstracts for the amount of actual damages sustained; provided, that such liability shall not accrue in favor of any person who had actual notice of the error or mistake complained of." (*Comp. Laws Utah*, 1917, *sec.* 1589.)

And in Utah, loan, trust and guaranty companies may be organized under statute applicable to corporations generally, and may exercise among other powers, the power "to make insurance of every kind pertaining to or connected with titles to real estate." A company must have a paid up capital not less than \$25,000, and in cities of the first class of not less than \$100,000. (*Comp. L. Utah*, 1917, *secs.* 1200, 1200-1, 1205.)

South Dakota.—"It shall be lawful for any person to engage in the making or compiling of abstracts of title to real property in this state, or to demand or receive payment for the same, without having first filed in the office of the county auditor of the county in which such business is conducted, a surety bond to the county, in the penal sum of ten thousand dollars, or a bond in such sum, with not less than three sureties, resident of the county, to be approved by the board of county commissioners of such county, conditioned for the payment by such abstractor of any and all damages that may accrue to any person by reason of any error, deficiency or mistake in any abstract or certificate

of title made and issued by said abstractor; provided, that in counties of less than ten thousand inhabitants, such bond shall be in the penal sum of five thousand dollars." When the bond is filed and approved the abstractor is entitled to a certificate of authority, and right of access to the records. Provision is made for new sureties on demand by the county commissioners, and for the withdrawal of sureties who may desire to do so. Abstractor's charges are fixed by law as follows: "For first entry or transfer on any one abstract or continuation thereof, one dollar; each subsequent entry or transfer, fifty cents, provided that an additional charge may be made for entries or transfers containing more than two hundred words, of twenty cents per one hundred words for such excess; for certificates as to the abstract of records of the office of register of deeds, twenty-five cents; for entry or certificate relating to taxes, twenty-five cents; for entry as to mechanics' liens, or judgments, fifty cents; for certificate as to mechanics' liens, twenty-five cents; for certificate as to judgments, fifteen cents, for each name certified." In connection with this statutory fee schedule for abstractors, it is interesting to note that it is the statutory duty of a register of deeds in this state to make, continue and certify abstracts of title to lands, when requested to do so, from the records in his office, and his fees therefor (payable into the treasury) are fixed by statute as follows: "For the first entry or transfer on any one abstract, one dollar; for each subsequent entry or transfer on each abstract, thirty-five cents; for each entry or certificate relating to taxes, twenty-five cents, for entry or certificate relating to mechanics' liens, twenty-five cents; for certificates as to judgments which shall constitute a lien on the property so abstracted, fifteen cents for each name so certified to; and on continuations the fee for each entry made thereon shall be thirty-five cents, and twenty-five cents for each certificate of continuation." (*South Dakota Rev. Code, 1919, secs. 10541, 10542, 10545, 5922.*)

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#### NEW COUNTIES AND RECORDS

With respect to the organization of counties there is considerable variation among the States. Ordinarily the legislature has the power to establish counties without express grant of authority. Where the legislative power is not limited by constitutional provisions it may create new counties, divide or consolidate existing counties, change their boundaries or abolish them, in its discretion, without consent of the people. In some states the power of the legislature is restricted by constitutional provisions fixing a minimum of area and population for new counties. Exceptions are sometimes made to the minimum area, as where it provided that if the population exceeds a specified number (in one state one hundred thousand) a county may be divided, although one of the counties created

may have less than the minimum area: or, as provided in another state, any city of twenty thousand inhabitants may be made a separate county. Minimum population required for the creation of a county, where prescribed, ranges from one thousand to ten thousand. Minimum areas vary also,—275, 400, 410, 432, 500, 600 and 625 square miles and upward. In some states counties can be formed only by the consent of the voters, and changes in boundary lines of existing counties require popular approval through a referendum in the districts concerned. In other states the legislature is required by the constitution to provide for the creation of new counties by general law. The constitution of at least one state permits formation of new counties by petition and popular vote without legislative action. Some constitutions contain the provision that when an existing county is divided the new county line shall be at least a specified number of miles (usually ten or twelve) from the county seat.

It is universally held that when an instrument affecting title to land has been duly recorded in the county wherein the land affected by it is situate, its validity will not be impaired by a subsequent change in the boundaries of the county whereby the land will be in a different county. It is not necessary to record it again in the new or other county into which the former county may be divided, or to which it may be annexed. (*Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. ed. 641; *Koerper v. St. Paul, etc., R. Co.*, 40 Minn. 132, 41 N. W. 656; *Davidson v. Root*, 11 Ohio 98, 37 Amer. Dec. 411; *Green v. Green*, 103 Cal. 108, 37 Pac. 188; 18 Ann. Cas. 158, note.) If the rule were otherwise the legislature, by incorporation of land in a new county, could destroy with impunity the rank of mortgages and impair the obligations of contracts. So the lien created by a recorded mortgage is not impaired by the division of the county and the incorporation of the land encumbered by the mortgage in a different county from that in which the mortgage was recorded. (*Ellison v. Her*, 22 La. Ann. 470; *Davidson v. Root*, 11 Ohio 98, 37 Amer. Dec. 411.) And, likewise, the lien of a judgment upon land is not lost when a new county is organized which includes within its limits the land subject to the judgment lien. (*Davidson v. Root*, 11 Ohio 98, 37 Amer. Dec. 411; *Lumpkin v. Muncey*, 66 Tex. 311, 17 S. W. 732.)

Until a new county is actually organized, instruments affecting lands within it should be recorded in the old county. If the land, at the date of an instrument, lies in one county, but if, at the time it is presented for recordation, a new county has been formed out of the old one which includes the land described, the instrument must be recorded in the new county, and not in the old one. (*Astor v. Wells*, 4 Whea. U. S. 466, 4 L. ed. 616; *Garrison v. Hayden*, 1 J. J. Marsh. Ky. 222, 19 Amer. Dec. 70; *Stewart v. McSweeney*, 15 Wis. 468; *Sapp v. Cline*, 131 Ga. 433, 62 S. E. 529.)

## LAND BOUNTIES FOR MILITARY SERVICES

The Colonial Congress, by a resolution passed September 16, 1776, provided for grants to officers and soldiers who should engage and continue in the military service to the close of the Revolutionary war.

or until discharged by Congress, or to the representatives of officers and soldiers slain by the enemy. The lands were to be provided by the United States, and the expense of procuring them to be borne by the States, as other expenses of the Revolutionary War. Grants were allowable as follows: For a colonel, 500 acres; lieutenant-colonel, 450 acres; major, 400 acres; captain, 300 acres; lieutenant, 200 acres; ensign, 150 acres; a non-commissioned officer or soldier, 100 acres. September 20, 1776, the resolution was amended to prohibit grants to any person or persons claiming under an assignment of any officer or soldier. August 12, 1780, the Continental Congress extended the resolution of September 16, 1776, so as to allow a major-general, 1,100 acres, and a brigadier-general, 750 acres. This legislation originated in the United States bounties of lands for military or naval services. To satisfy the warrants issued under the above provisions, certain tracts of country with defined limits were set apart to which locations were limited. These reservations were known as "military districts." By act of May 30, 1830, these revolutionary warrants could be exchanged for scrip, and the latter was available for location in other sections than the "military districts."

In the prosecution of the war of 1812, Congress authorized land bounties for services in the army, by acts of December 24, 1811, January 11, 1812 and February 6, 1812. The first promised 160 acres, for five years service, to each non-commissioned officer and soldier, to go to his heirs or representatives if he was killed in action or died in the service. The second act authorized the same bounty, for the purpose of raising certain requirements. The act of February 6, 1812, authorized the President to call out 50,000 volunteers for twelve months, and promised 160 acres of land to the heirs of any non-commissioned officer or soldier who might be killed or die while in the service. The total number of warrants issued, 29,186, and 4,853,600 acres were taken up.

The war with Mexico was proclaimed May 13, 1846, and on February 11, 1847, an act was passed giving bounties for military service. It ordered that non-commissioned officers, musicians, and privates who served in the volunteer army for twelve months, or who should be discharged for wounds or sickness prior to the end of that time, or the heirs of such as should die while in the service, should receive a certificate or warrant from the War Department for 160 acres of land, the same to be entered at any district land office on lands open to private entry; the certificate to be returned to the General Land Office, and patent to issue therefor. There was a provision in this act for acceptance by applicant of a Treasury scrip for \$100 at 6 per cent



interest in lieu of 160 acres of land. Those who served less than twelve months on like terms as to death or discharge for wounds were to receive each a warrant for 40 acres of land, or a treasury scrip for \$25, if preferred. The privileges of bounty lands were extended by the act of September 28, 1850, granting a warrant for 80 acres, and relating to services in all the Indian wars since 1790, the war of 1812, and to the commissioned officers in the war with Mexico; by act of March 22, 1852, making land warrants assignable, and extending the provisions of the act of September 28, 1850, and by the act of March 3, 1855. This last act made 120-acre, 100-acre, 60-acre, and 10-acre warrants, and extended the bounty-land privilege so as to make the entire classes receiving the same some thirty-two in number, in the army, navy and elsewhere. It was a comprehensive act, embracing almost all the wars the United States had engaged in. It granted to all officers and soldiers who had served in any war in which the United States had engaged, from the Revolutionary War to March 3, 1855, 160 acres each, or so much with what had been previously allowed, as would make up that quantity. It extended the concession to a service of only fourteen days or an engagement in a single battle, and, in case of death, to the widow or minor children.

By act of March 3, 1803, Congress directed the Secretary of War to issue land warrants to Major-General Lafayette for 11,520 acres. The land was to be located, surveyed, or patented at his option; or the warrants could be received in payment for lands within the present State of Ohio. March 27, 1804, Congress ordered that the warrants might be located by Lafayette in the then Orleans Territory. Congress on December 28, 1824, ordered that \$200,000 be paid to General Lafayette, and granted him or his heirs a township of land, afterwards located in Florida.

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#### THE WRIT OF ELEGIT

At common law a judgment created no lien upon the debtor's real property, nor could it be levied on or sold to satisfy the judgment. Land was, for the first time, made liable to satisfaction of judgments by the statute of 13th Edward 1, Chapter 18, otherwise known as the statute of Westminster the second, chapter 18, which provided for the writ of elegit. The effect of and proceedings under these writs is rather curious at this day. A writ of elegit issued to the sheriff, who, on receiving it, summoned a jury of twelve men. This jury, after being impaneled, ascertained what goods and chattels, except oxen and beasts of the plow, and what lands and tenements the debtor had in the bailiwick. The jury then estimated the value of the goods and chattels, excepting the oxen and beasts of the plow, and for the purpose were authorized to visit the place occupied by

the debtor and to examine his property. The goods and chattels were then delivered to the creditor as of the value fixed by the jury. If this did not satisfy in full the amount set forth in the writ, or if the debtor had no goods or chattels, the jury then determined what was a moiety in value of the lands and tenements of the debtor. The statute authorized the taking of a moiety of his lands, but this was held not to mean the taking of an undivided half or the half of each separate parcel if the debtor had more than one, but the half in value. The jury, therefore, segregated, described and set over to the creditor a particular part of the debtor's lands and tenements as a moiety. If the debtor had a house containing several rooms, certain rooms were, as a moiety, awarded the creditor; or if the debtor had two tracts of land of equal value, one would be taken. The writ was returned to the court out of which it issued, with a recital of the proceedings had pursuant to it. The creditor became a tenant by elegit of the lands and tenements awarded him until from the rents and profits therefrom his judgment was satisfied, unless sooner terminated by payment or discharge of the judgment in other ways, or by termination of the debtor's estate in the lands, as, for example, by his death if a tenant for life.

#### A CONTRAST BETWEEN LIABILITIES

There is a marked difference between the nature and character of a contract with an abstracter for a certificate of title, and the nature and character of an insurance contract with a title insurer. The difference can be readily observed by comparing the facts involved and the decisions rendered in two cases in New York; the one in an action respecting a certificate, the other respecting an insurance policy.

A title company was employed to search the title to certain premises, and pursuant to such employment made and delivered a certificate that a good and marketable title thereto could be conveyed free and clear of incumbrances and defects. Relying upon the certificate the party who ordered it and to whom it was delivered, accepted a conveyance of the property free and clear. However, there existed an order of the fire department requiring installation upon the premiss of a wet sprinkler system and the erection of fire escapes, which had to be and was complied with and which cost a large sum. An action was brought against the title company to recover the amount as damages suffered by reason of the error in the certificate in the omission of any mention of this liability. The title company showed as a defense, that prior to its employment to make the certificate, the party who ordered it had entered into a contract to purchase the property in which it was provided that title should be taken irrespective of any violations, orders or requirements, existing or purporting to exist, upon the records of the fire department. The court held that a recovery for failure of

the title company to make an accurate certificate could be obtained only if damages resulted from the inaccuracy. But in this case the party for whom the certificate was made was bound to take the title to the premises, under the contract of purchase, notwithstanding the existence of the requirements of the fire department, and, therefore, no damages had accrued by reason of the error in the certificate, for the expense would have been incurred had the certificate stated the true facts. No recovery was allowed. (*Kenmerson v. Title Guar. and Tr. Co.*, 100 Misc. 723, 166 N. Y. Supp. 369).

In the other case the plaintiff was assignee of a contract to purchase certain property subject to all assessments which should become a lien thereon after a specified date. The plaintiff subsequently acquired title and obtained a policy of title insurance. At the time the title was acquired and policy dated there existed an assessment lien upon the premises not mentioned in or excepted from the policy. The insured plaintiff knew of the proceeding pending as to this assessment, and knew the lien of it had been perfected when title was acquired and policy issued. It was an assessment which the plaintiff was bound to pay under the terms of the contract to purchase. The insured paid the assessment and then sued the title insurance to recover the amount as a loss within the terms of the title policy. A recovery was allowed. It was the view that a policy of title insurance partook of the nature of a covenant of warranty or against incumbrances in a deed, and as in cases of such covenants, knowledge of the covenantee—insured in a policy—was not material. The proceeding for the assessment might be without jurisdiction, void, vacated, or the assessment reduced. The insured had a right to secure protection against payment of the lien, the various pitfalls that beset a title, against possible claims, and “to obviate the need and expense of professional advice, and the uncertainty that sometimes results even after it has been obtained.” Such were held to be the purposes for which insurance was sought.

#### RECENT DECISIONS

Though a state code authorizing a judge to appoint a temporary guardian for a person alleged to be mentally incompetent to manage his own affairs, does not provide that notice be given to the alleged incompetent before such appointment, such notice is required by the common law, and is necessary under the due process guaranty of the Constitution. Such a proceeding is of a character that it cannot be *ex parte* and valid. *McKinstry v. Dewey*, 185 N. W. 565, Iowa.

Under the common law an administrator had no title to, interest in, or right to the possession of real property, and could not maintain an action with respect to it. Hence the authority of an administrator with reference to real property is derived from the statutes, and, therefore, an

administrator can sell real estate only for the purposes and in the manner prescribed by statute. *Lamont v. Vinger*, 202 Pac. 769.

Under a statute defining a homestead as a "dwelling house in which the claimant resides, and the land upon which the same is situated," a leasehold interest will support a claim of homestead. *Downey v. Wilber*, 202 Pac. 256.

A tenant in common may claim a homestead in the common property as against the claims of his creditor, but cannot as against the claims of his co-tenants. *Peets v. Wright*, 109 S. E. 649.

The Estate Tax Act of September 8, 1916, sec. 202 b (U. S. Comp Stat., sec. 6336½ c, subd. b), providing for a tax with respect to property of which a decedent has at any time made a transfer, is not retroactive. It does not apply to transfers made prior to its enactment, the words "at any time" being limited to a time subsequent thereto. *Curley v. Tait*, 276 Fed. 840.

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### COST CONDITION IN POLICY

Some companies expressly stipulate in policies issued by them, in substance, that, if the holder of a policy having a fee (or other estate) shall, within a specified number of years from date of his policy, sell or mortgage all or part of such estate and apply for a new policy in favor of his grantee or mortgagee, the insuring company will upon surrender of the former policy, and upon approval of title, charge only a part, such as a half, of the regular fee for the amount of the insurance.

In cases where the regular or customary insurance charge is inclusive of cost of examination, or, in other words, in all cases where cost of examination is not computed as a charge separate and distinct from insurance premium, it would seem the advisability of making the foregoing stipulation an express part of an insurance contract is debatable. An owner, either of a fee or other estate, can, even in a comparatively short period of time, say five, six or seven years, effect so many transactions, or involve the title in such complications as to create a bulky and complex record presenting perplexing problems for solution. Indeed, the record during the stipulated period subsequent to the date of the original policy may be greater in volume than the record prior to the date of the original policy, and, consequently the cost of an examination and determination of title may be out of all proportion to the charge fixed by the stipulation. Furthermore, while the title may be ascertained to be defective, and to present probable or possible risks, yet these may be of such character that good business policy would not justify a rejection on account of them. Hence, title would have to be approved, the risk or risks assumed, though the stipulated fee would not be fair compensation therefor. Besides it does not seem

advisable to stipulate some years in advance for a specific charge that necessarily eliminates consideration of probable general increase in costs of operation that may be brought to pass during that period. It may be such a condition would but prove a contract to do business at a loss, and without any offset of advantage.

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#### TITLE LAW BREVITIES

"What matters of law or what matters of fact are sufficient to make a title so doubtful as to be unmarketable, cannot be indicated by positive rules. Facts or questions which present no difficulties to one judicial mind may, in the opinion of another, raise insuperable objections to the title. It is obvious that the existence of a 'fair and reasonable doubt' as to the title must depend upon the capacities of the judge to whom the question is addressed. 'Practically, the judge acts upon his own doubts.'" Marketable Title, Maupin, 3 ed., p. 770.

"In some localities it seems that it is common to treat an abstract of title as merchantable or unmerchantable, without regard to the nature of the title it discloses. The value of the abstract depends, of course, upon the skill with which it is prepared, and upon the reputation and ability of the compiler. An agreement to furnish an abstract would seem necessarily to imply that the document should be thorough and complete, and should be made by a competent person." Marketable Title, Maupin, 3 ed., p. 170.

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Even so prosaic a document as an abstract of title sometimes hints of romance and perchance of tragic failure. Thus, under date of May 10, 1920, there appears the following order of dismissal of a suit for divorce: "Parties present in person and by attorneys; evidence heard and plaintiff dismisses his petition; defendant dismisses her answer and cross-petition, and cause dismissed, and parties make up and go away arm in arm, determined to start life's battles anew."

Did they persevere in their good resolutions? They did—not. On March 24, 1921, a petition in a suit for divorce, brought by the wife against the husband, was filed, and on March 31, 1921, a temporary restraining order was granted enjoining him from encumbering or disposing of any of his property, or from preventing the wife from removing her own personal property from their former home.

And further, the narrator, not having the gift of prophecy, saith not.

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#### FOUND IN ABSTRACTS

In one of the Northern counties of Michigan the records show a title to land was passed between Killem Quick and Assassine, his wife, to Hole Inn Mudd. Later on the same land was conveyed by Dicer Perfumme, single man, to Washout Banks. In April, 1919, one undivided part of the same property was deeded by O. B. Jolly to Ring Curfewe, who in turn mortgaged his interest to A. Shark.

# BOOK REVIEWS

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**LAWS OF BUSINESS**—For all the States and Dominion of Canada, by Theophilus Parsons, LL. D. Published and for sale by George H. Doran Company, New York. Buckram bound. \$6.00 delivered.

A new and enlarged edition with fresh chapters on recent business legislation of this work which for half a century has been accepted as an authority has been compiled by Charles M. Reed. It is far more necessary in the law office than Blackstone. It possesses a wealth of information for every business man. It is the legal Webster for banks, bankers, financial and business institutions. It puts its information in a form that requires no technical knowledge, so that it becomes accessible to every man. One of the outstanding features is an index of subjects which makes it possible to answer any question under discussion as it arises. It is a safe guide in every business question which is likely to arise in any State of the Union, as well as the Philippines, Hawaii, Porto Rico and Alaska. Parson's is not a substitute for a lawyer, but it is a big factor in developing a more efficient and trustworthy personnel, because it is a fountain of information on the legal questions that arise from day to day in every business and financial institution.

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# THE Lawyer and Banker

AND

## SOUTHERN BENCH AND BAR REVIEW

CHARLES E. GEORGE, Editor  
FRANK C. HACKMAN, Associate Editor

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### *ITA LEX SCRIPTA EST*

*We Believe that the privileges of American citizenship carry with them corresponding responsibilities.*

It was Daniel Webster who said:

"God grants liberty only to those who love it  
And are always ready to guard and defend it."

The Editor stands for temperance in all things, but is certain the Volstead prohibition enforcement act is a moral failure and has proven a dangerous breeder of discontent and contempt for the law of the land.

There are grave evils in drink, but they are not to be compared with those arising from intolerance and moral autocracy. Throughout the land those who have heretofore had respect for the law now flout it with disdain. Respectable citizens regard the violation of the prohibition law as an achievement—not a wrong. In place of light wines and beer with meals, good whiskey in the clubs, we find a large percentage of the homes jeopardized and unchristianized by the making of and use of "hooch" and the creation of an appetite for drugs.

The Eighteenth Amendment required millions of men and women abruptly to give up habits and customs of life which they thought not immoral or wrong, but which, on the contrary, they believed to be necessary to their reasonable comfort and happiness, and thereby, as we all now see, respect not only for that law but for ALL LAW has been put to an unprecedented and demoralizing strain in our country, the end of which is difficult to see.



Education only proves a crime deterrent. Legislation cannot control a man's appetite nor make for more virtue, temperance or respect for law. One can be clubbed into unconsciousness but not into a state of sensibility.

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The Editor of this magazine presented his views to the Committee on Ways and Means at Washington in opposition to the Mills bill. This measure was a taxation measure which brought no return for the tax to be imposed. It could but prove unworkable, impracticable and was clearly unconstitutional. From a legal view point it ranks along with the original National Child Labor Beverage-Keating Act, which has been declared unconstitutional by the United States Supreme Court. The decision in effect is that the law in question was a usurpation of the rights of the State to legislate on such matters. The Mills bill was a national measure taxing the owners of every automobile two dollars for a certificate of identification. It does not come within the exceptions heretofore recognized that permits the Federal Government in interstate matters to prescribe regulations in the interest of public health and morals.

It might as well be accepted as a fact from today on, that in future the reserved rights of the States will be more generally recognized and such laws as the proposed Mills bill, the Anti-Lynching Act, the Sheppard-Towner law in aid of maternity and traffic concerning the rights of unborn children will be considered as local rather than national legislation.

It should be remembered that any law placed upon our statute books which nominally professes to assess a tax upon the profits of the individual or corporation is in reality but a provision which stands out as a subterfuge and constitutes a penalty with all the characteristics of regulation and punishment. The people cannot legally be coerced by Federal interference by a tax penalty in respect of matters which are clearly the business of State governments under the Federal constitution.

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We may be pardoned for calling attention to the fact that in the year 1921 there were filed in the various Federal Circuit Courts of Appeal, briefs on important questions wherein reference was made to editorials previously printed in *THE LAWYER AND BANKER*, while special feature articles on constitutional questions that appeared in our pages were quoted as authority no less than twenty-eight different times.

Briefs filed in the United States Supreme Court,—notably in the

very important case of *Smith vs. Kansas City Title and Trust Co.*, made mention of *THE LAWYER AND BANKER* as authority seven times. Allen Ripley Foote in discussing the "Injustice of the Federal Farm Loan Law" (Columbus, Ohio, 1921) says:

"The leading authority favoring the Government's contention is undoubtedly *THE LAWYER AND BANKER* a magazine that can always be read with great profit."

The late Chief Justice White of the United States Supreme Court wrote the Editor a few months prior to his death saying:

"I have been a subscriber to your magazine for ten years and have greatly benefitted by reading it. I admire your editorial independence."

We recognize that it is impossible to be always right but strive to advance to that height which will at all times give us a better, clearer view of the rising sun of tolerance and civilization. Charity and liberty should be the watchword of every lawyer in the land.

Our attention was recently called to a letter sent out by The Commercial Law League of America in which it was said:

"To you as a member of the League, I wish personally to advise that very strenuous objection has been raised with reference to any of our members being connected with or subscribers to in any manner *THE LAWYER AND BANKER* magazine."

The reason for the above screed probably is found in the fact that in The Select List of Counsel printed by and recommended by this magazine, we found it advantageous to refuse membership to any applicant who advertised himself or his firm as connected with the C. L. L. A. There are now and have been in past years a few good lawyers who have been induced to join this organization but we are quite certain none of these were or are proud of the fact. There are too many "Jack in the Box," "Punch and Judy," "Little Tom Thumbs" of the collection agency branch of the legal profession to make membership an honorary distinction.

The membership of the Commercial Law League of America is largely composed of near-attorneys and collection agents who are not qualified for the practice of law. A rare gathering of bad debt run-ners-ups, legal sharks and wolves of commerce. Men and boys suited to Police and Justice Courts, but who would be lost in legitimate, technical, litigation in the Superior or Circuit Courts. Dickens in his creation of Uriah Heep well pen-portrayed the average member of the C. L. L. A.

Following the publication of the letter referred to, *THE LAWYER AND BANKER* added twenty per cent. to its subscription list within three months.

Ex-Gov. Warfield, president of the Fidelity and Deposit Company of Maryland, wrote:

"Your list of lawyers specializing in real estate law and your list of abstracters as published in *THE LAWYER AND BANKER* is of the highest class. We would not hesitate if called upon to guarantee their work and opinions."

Hon. Joseph A. Breaux, Chief Justice of the Supreme Court of Louisiana, wrote The Editor:

"Your journal, devoted to the discussion of current legal, judicial, and legislative matters, meets the hearty co-operation of both Bench and Bar. It is a legal magazine of high standard, filling a long felt want among real lawyers."

Hon. Benj. W. Kernan, president of the Louisiana Bar Association, writes:

"It is a legal magazine of high standard. It takes real courage to start and independently edit such a publication. Your efforts should meet with success."

Hon. Marshall D. Ewell, M. D., of Chicago, formerly of the Kent College of Law, and also lecturer on Elementary Law in the University of Michigan, contributed this opinion:

"*'THE LAWYER AND BANKER'* is a mental tonic. It is independent in every line of its editorial. It is a valuable magazine for the lawyer who stands above the common herd. It will not be appreciated by the collection agency class of practitioners for the very good reason that they cannot comprehend it, but it will win out with men who stand at the top of our profession."

E. B. Kellerman of Lebanon, Mo., wrote in December last:

"I am enclosing check to pay my subscription for the coming year. It is with pleasure I do this, as it is a splendid publication. It is clear and decisive in its editorials and while I do not always agree with the Editor, yet I respect and admire the conscience that seems to inspire them."

Claud D. Hall of St. Louis, Mo., writes:

"I find *THE LAWYER AND BANKER* at all times helpful, and it is a pleasing recreation to read it as well."

W. B. Whitney of Beaver City, Neb., says:

"After having taken *THE LAWYER AND BANKER* for one year, I find that it is the magazine which I consider indispensable to the title man. I often find an article which is worth an entire year's subscription to the magazine."

Fifteen years ago, this magazine first faced a critical public. At the end of the first year it had 1240 prepaid subscribers, as many as the average law magazine of today or past years, has ever obtained. Its course, even during the war period has been one of steady gain. It has met unscrupulous and cowardly opposition, but has met each attack toe to toe, and face to face. We believe that in A. D. 1922 it has a larger paid circulation than all other American law journals and if

opinions of leaders of the bar are to count, it stands alone as an independently owned and edited magazine of the highest standard and moral calibre.

THE LAWYER AND BANKER will undoubtedly be in business at the same old stand when the C. L. L. A. shall have removed its headquarters to Jerusalem.

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## EDITORIAL COMMENT

There was a time in common law jurisprudence when no man was permitted to assert his insanity in civil cases because, it was said, the law will not allow a man to stultify himself. The reason seems ridiculously inadequate now but it was regarded as sufficient by great lawyers. Under that rule a gibbering lunatic could not escape the enforcement of any ruinous contract he may have made.

In criminal cases, the great Lord Coke, in a day enlightened enough to have produced Shakespeare, laid down the rule that no degree of insanity short of a complete loss of memory and understanding would be sufficient to excuse a crime. It would be difficult to find a patient in all of the asylums in Michigan who could not be hanged under that law, but it was the law and many an unfortunate lunatic suffered in consequence.

As time went on men saw the monstrous character of that brutal test, and changed it so that insanity was proved in court by showing that the accused person was subject to delusions. That was more humane but many years were still to pass before courts and lawyers were convinced that a person might be insane and still not manifest signs of wrong belief as to evident matters of fact. At last that step was taken and criminal responsibility was tested by the question whether the accused person was capable of telling right from wrong in the particular case at bar. That rule was established within the memory of living men in British courts and is still the rule there. In America courts have recognized a form of insanity which does not obscure from the sufferer the nature of the acts he commits but deprives him of his natural ability to do right.

Under the ancient practice no expert was needed to determine the mental condition of an accused person, for none but the completely demented were held to be irresponsible, and any child can recognize such sufferers. But step by step with the process which brought legal rules into compliance with the teaching of science there came greater and greater need for expert assistance in determining the mental condition of accused persons.

This progress itself was enough to throw the courts more and more into the hands of psychiatrists for guidance in handling the insane but still more knowledge was gained after the establishment of modern rules of responsibility. Processes for the accurate measurement of intelligence have been worked out. Forms of mental abnormality which are not quite insanity have been discovered and made readily identifiable. As a result enlightened judges have become keenly aware of the fact that their off-hand estimates of human nature may mislead them and result in injustice. Instead of the old sense of antagonism between criminal law and scientific truth which caused judges and legislatures to relax their rules against the insane slowly and grudgingly

there is a new spirit abroad. Science no longer needs to batter down the doors of the courts to save raving men from the gallows. The scientific man has moved into the forum at last and his presence there is eloquent testimony to modern enlightenment.

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The Law is the true embodiment  
Of everything that's excellent.  
It has no kind of fault or flaw,  
And I, my Lords, embody the Law.

Doubtless the most serious barrier to freedom in the United States today is the sedulously cultivated sacro-sanctity of the apparatus, processes and decisions of legal interpretation. Those who administer this interpretation have been exalted to the status of a priesthood, with rigid and damaging caste-privileges. The status of this hierarchy is all the more dangerous because its membership has intimate relations with privilege, and because its decisions, which are put forth to regulate the life of the laity, are based, not on the interpretation of a single body of intelligible revelations, but on precedents which are widely scattered and generally unintelligible to the layman.

In its official duties, this priesthood enhances its prestige by an increasing aloofness from reality. Its decisions are rendered largely on the assumption of conditions that have vanished for a century or more. With characteristic snobbishness, it has made virtually no application of the latter-day discoveries in anthropology, psychology, physiology, biology, pathology, and other sciences that have revolutionized our concept of what lies at the root of human progress. It remains wholly unaffected by modern social theory, based on a more accurate knowledge of the human machine, a broadened vista of human possibilities, and the application of science to production. Alone among those branches of activity assuming the pretensions of a science, the law keeps its vision fixed on the past, and rummages in the dustbin of the centuries for musty precedents to apply to present human progress, or failing a precedent, it bases its stand on panicky intuitions. Among our institutions of today it stands as a Neanderthal man, essentially ignorant, relentless, sub-human, ruling by a divine right of its own prescribing.

Thus, efforts to better our civilization by readjusting its social and economic structure to an intelligent conformity with sweeping industrial changes and the growth of scientific knowledge, are constantly thwarted by the law and its priestly caste. If in response to general insistence, for example, the legislative authority passes a workman's-compensation law, the hierarchy may nullify it on the strength of some obscure enactment of the eighteenth century. If an attempt is made to transfer some form of vested thievery into its proper sphere of public service, a piece of rigmarole, possibly the product of some imbecile judge of George III's time, may be produced to nullify the project.

Nor is there any escape from this sabotage of enlightenment. The common citizen may disregard the findings of natural science, if they oppress him; he may change his physician, ignore his clergyman, recall his recreant legislator. But the law stands over him always, immovable and unapproachable, wrapped in its mysteries. The common man may still criticize with a fair degree of freedom an act of the legislative or administrative branch of

the Government. Criticism of an act of the legal hierarchy is akin to *lese-majeste*. The critic may find himself flung into jail by the power of the very individual among the hierarchy whose original decision had stirred him to protest. Moreover, little assistance can be expected from other branches of the Government against the tyranny of the judicial machine. In fact, the sacerdotal theory of the law has permeated the legislative and administrative branches. All the higher national administrative posts are commonly held by lawyers, and though lawyers and judges together number but one-tenth of one per cent of the population, the priesthood normally occupies ninety per cent of the seats in Congress.

It seems curious that there has been so little tendency among the legal caste, which includes some of the most intelligent minds in the country, to analyse its own peculiarly anachronistic position in our national economy. Obviously, however impregnable that position may seem at present, those who occupy it can not indefinitely bind a twentieth-century industrial and economic system to the corpse of eighteenth-century social concepts. The present union of the two is potentially explosive, even among a population as docile as our own; and in any upheaval, the chief sufferers would be the members of the priesthood themselves and the privileged groups whose interests they represent. Those who are called leaders of the bar have displayed little willingness to see this. Sometimes they grudgingly propose some petty reform in legal practice, and hail it as millennial; occasionally, it is true, a few among the priesthood show some sort of disposition to recognize reality. For instance, a small group of the higher legal clergy protested against some of the more notorious invasions of our liberties by the legal autocracy at Washington during the Wilson regime. Recently, too, a committee of jurists filed a protest with the State Department against our lawless occupation of Haiti—and incidentally, were snubbed for their pains by the former Supreme Court Justice who now conducts our foreign affairs with the secrecy of a corporation counsel.

But these are sporadic symptoms. More significant, we hope, is a paper before us setting forth the programme for "special conferences in jurisprudence" intended for members of the bar, teachers of law and advanced students, at the summer session of a leading Eastern law school. Professor Roscoe Pound is announced to give a course in sociological jurisprudence, discussing "theory of law and legislation; the province of written and unwritten law; problems of law-reform in America." Professor John Dewey will lecture on "Some Problems in the Logic and Ethics of Law," described as "an attempt to apply the method of contemporary pragmatic logic and a social theory of ethics to some of the more fundamental questions relating to legislation and the procedure of the courts; also a criticism of some of the traditional logical and ethical theories which influence current jurisprudence, especially eighteenth-century philosophies." Professor Walter W. Cook's subject is "Some Problems of Legal Analysis," of which the promising summary includes: "Analytical jurisprudence distinguished from philosophy of law and from historical, comparative, teleological and other kinds of jurisprudence: history; aim. Analysis of particular legal concepts such as: right, ownership, title, 'void' and 'voidable'; possession; capacity; intent and motive; legal personality; etc. Application of this analysis to concrete legal problems."

Here we have a course of remarkable range, and the character of the lectures is such as to give assurance that the discussions will be fundamental and fearless. Professor Dewey, it will be noted, is not a member of the legal priesthood; and this summons of a philosophical vivisectionist to the convocation within the temple, sets a valuable precedent. It is, of course, a small beginning, but how far might not its development reach! An analysis of the foundations of jurisprudence, of its proper relationship to the world as it is, is in time bound to react in a wholesome readjustment of legal concepts to the conditions of actual life. Under such a revelation of values the legal neophyte will hold it axiomatic that unless the basic law is sufficiently fluid to be readily moulded by the pressure of changing conditions and needs, it is worthless; unless the law is a working synthesis of reality, it can serve no purpose in human society.

This venture is potentially of the greatest interest and importance. We should like to make attendance compulsory upon the membership of the United States Supreme Court and of all the Federal and State courts. Why not discuss the "Whichness of the Why" or the basic foundation of "It." It gives us pleasure to congratulate the Dean of the Law School on the banks of the Hudson on his vision in conceiving an instrument of such promising service.

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The opinion of the United States Supreme Court by Mr. Chief Justice Taft, in re The United Mine Workers of America *et al* Plaintiff in Error vs. The Coronado Coal Company, *et al*, holding that although a labor union is an unincorporated association of persons, yet these great labor organizations have received affirmative legal recognition of their existence and usefulness and provisions for their protection and of their right to maintain strikes when not violating law or the rights of others; the embezzlement of funds of their officers has been especially denounced as a crime; their so-called union label has been protected against pirating and deceptive use, and authority to sue and authority for suit by them to enjoin its use has been conferred in many states; and in view of all this it logically follows that such an association should not be allowed to use its great power in the raising of large funds and directing the conduct of its members in carrying on in wide territory industrial controversies and strikes out of which so much unlawful injury to private rights is possible and be free from liability for injuries by torts committed in the course of such strikes; and that in the courts such organizations are suable for their acts, and funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes.

That to give federal jurisdiction of an action for damages against a labor union for injuries suffered in a strike it must appear that the obstruction to mining is intended to restrain commerce, or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred.

No decision of the Supreme Court in recent years has given rise to wider comment in the press of the country, and that it has pierced to the quick the vitals of labor organizations generally is shown by the irritated and energetic comments of Samuel Gompers and other labor leaders who had come to feel secure in the claim that labor organizations were a privileged class and

immune from the effects of many laws applicable to the common citizen and ordinary people of the country.

While the opinion is exhaustive and announces clearly the principle that a labor union or unions in effect constitute individual aggregations of such a nature and to such an extent that under the law they are responsible for the acts of their constituent members done in pursuance of the union's policy and plan, and that the unions are suable as such, there is yet on reflection a tinge of disappointment to the ordinary citizen in the result of the opinion.

While announcing distinctly and in detail this principle, the net result of the opinion in the end is to avert the punitive effect of the original decree or judgment which was rendered by the lower courts in a bold reliance upon the principles which are sustained by the Supreme Court; this practical failure of actual results in the particular case arising from the fact that the court fails to find that the particular outrages in this case constituted an invasion of interstate commerce, and the defendants in the case clearly proved by all the evidence, as judicially established by the judgment, to have been guilty of the most outrageous conduct and the most flagrant violation of all principles of law and order find themselves freed from the logical consequences of their acts.

Even to the lawyer and especially to the layman it must seem discouraging that in a case like this and in the contempt case against Samuel Gompers where the flagitious acts are proved conclusively, and even conceded, the logical and well merited remedy fails because of the peregrinations of the case through technically wrong channels.

If, however, it is not hereafter too persuasively argued to an indulgent court that the principles announced by the court in the opinion as to the liability of unions for acts of their members, under the circumstances stated, are obiter dicta, the case may yet stand as a foundation for sound relief in the future.

It is astonishing, by the way, that the announcement of principles which we as Americans have come to consider as fundamental and deserving of universal acknowledgment should have been so late in receiving judicial recognition and enforcement. Everybody knows and we all talk that the laboring man and the farmer should be subject to the same rules and principles of law as any other ordinary citizen, but our legislators by affirmative action and our courts largely by forbearance have allowed the fetish of "labor" and "toilers" to dominate the policy and conduct of the country to such an extent that the alleged tyranny of capital and aristocratic classes has been transferred to organized labor, and augmented in the transference.



# THE RIGHT TO BE CURED

By Charles A. Enslow of the Janesville (Wisconsin) Bar

While the right to engage in a lawful occupation cannot be denied a citizen, the state may regulate the manner in which the right may be exercised, under its police power,

Austin vs. Tennessee, 179 U. S. 343, 45 L. ed. 224.  
Blake vs. McClung, 176 U. S. 59, 44 L. ed. 371.  
Emert vs. Missouri, 156 U. S. 296, 39 L. ed. 430.  
Toney vs. Alabama, 141 Alabama, 120, 109. A. S. R. 23.  
Schmaier vs. Company, 182 N. Y. 83, 74 Northeastern, 561.  
State vs. Moore, 113 North Carolina, 697, 22 L. R. A. 472.  
Bradwell vs. Illinois, 16 Wallace, 130, 21 L. ed. 442.

and may impose conditions that work a hardship and even injustice upon the individual, and yet keep within the constitutional inhibition against abridging the privileges and immunities of the citizen;

Billing vs. Illinois, 188 U. S. 97, 47, L. ed. 400.  
Clark vs. Kansas City, 176 U. S. 114, 44 L. ed. 392.  
Magoun vs. Illinois, 170 U. S. 283, 42 L. ed. 1087.

but the state cannot impose conditions that will absolutely deprive the individual of the right to pursue any lawful calling, for the reason that a person's reputation, business, occupation, or calling is "property" within the meaning of the constitution,

Plessy vs. Ferguson, 163 U. S. 537, 41 L. ed. 256.  
Butcher's Union, etc., vs. Crescent City, etc. 111 U. S. 746, 28 L. ed. 585.  
Dent vs. West Virginia, 129 U. S. 114, 32 L. ed. 623.  
Brown vs. Jacobs, etc., 115 Georgia, 429, 41 Southeastern, 553.  
Gray vs. Building Trades, etc., 91 Minnesota, 171, 97 Northwestern, 663.  
State vs. Scougal, 3 S. Dakota, 55, 51 Northwestern, 858.  
People vs. Love, 298 Illinois, 304, 131 Northeastern, 809.  
Ex parte Garland, 4 Wallace, 333, 18 L. ed. 366.

and unreasonable and arbitrary restraints and burdens imposed upon persons pursuing a lawful calling may work a practical confiscation or an absolute extinguishment and destruction of that which the law denominates and holds to be the property of the citizen.

Palairot's Appeal, 67 Pennsylvania St., 479, 5 Am. Rep. 450.  
State vs. Chicago, etc. R. Co., 68 Minnesota, 381, 71 Northwestern, 400.  
Northwestern etc. vs. Minneapolis, 81 Minnesota, 140, 83 N. W. 527.  
Chicago etc. R. Co. vs. State, 47 Nebraska, 549, 41 L. R. A. 481.

The people of the country at the time the Constitution was framed were much concerned with regard to the privileges and rights that they were about to surrender to the government, and it was written into the document, in Article Four, that the citizens of each state should be entitled to all privileges and immunities of citizens of the several states. That was not looked upon as being enough of a guaranty, apparently, for by Article Fourteen of the Amendments to the Constitution, it was declared that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The privileges and immunities to which the citizens of the several states are entitled, as contemplated by Article Four, have been catalogued to some extent, at least, in an opinion in which it was said: "What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless, to such restraints as the government may prescribe for the general good of the whole".

*Corfield vs. Coryell*, 4 Wash. Cir. Ct., 371.

It will be noted that "the right to acquire and possess property of every kind" is specifically named, and in view of the fact that a person's business is "property" it would seem that a person's right to engage in his business within any state would be sustained, since the right to possess property includes the right to use and enjoy it in lawful trade, commerce, or business;

*Paul vs. Virginia*, 8 Wallace, 418, 19 L. ed.

357.  
*Ward vs. Maryland*, 12 Wallace, 418, 20 L. ed. 449.

*Williams vs. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

but in view of the fact that, in the case of the practice of a profession, the property of the person practicing is devoted to a use in which the public has an interest, the person so using his property must submit to being controlled by the public, for the common good, in the use of that property.

*Munn vs. Illinois*, 94 U. S. 113, 24 L. ed. 77.

*German etc. Co. vs. Lewis*, 233 U. S. 389, 34 L. ed. 612.

*People vs. Budd*, 117 N. Y. 1, 22 North-eastern,, 670.

This submission to regulation by the public on the part of the

practitioner admits the right of the public to control the manner of doing the business and recognizes the permission or license to engage in business as a privilege of a more or less special character, so that the right to practice a profession in which the public has an interest is a property right limited by public franchise which makes it a privilege, and it is stated that not every privilege enjoyed by a citizen of one certain state may be enjoyed by the same citizen in some other state to which he may remove.

Blake vs. McClung, 172 U. S. 239, 43 L. ed. 432.  
Paul vs. Virginia, 8 Wallace 168, 19 L. ed. 357.  
Ducol vs. Chicago, 10 Wallace, 410, 10 L. ed. 972.

This would preclude a healer licensed to practice in one certain state from demanding as a constitutional right the privilege to practice in another state by reason of his privilege and license to practice within the state which granted the license in the first instance, but in view of the court decision that "it is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition",

Butcher's Union, etc. vs. Crescent City, etc. 111 U. S. 746, 28 L. ed. 585.  
Powell vs. Pennsylvania, 127 U. S. 678, 32 L. ed. 253.  
Dent vs. West Virginia, 129 U. S. 114, 32 L. ed. 623.  
Northwestern etc. vs. Christensen, 203 U. S. 243, 51 L. ed. 168.

for a state to "substantially and practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are a part of the political community known as the people of the United States,"

Blake vs. McClung, 172 U. S. 239, 43 L. ed. 432.

by refusing to permit him or her to pursue an ordinary calling or trade, or practice a profession, hold and dispose of property, would be to deny such person the right of liberty and property as guaranteed to every citizen by the Constitution,

Halter vs. Nebraska, 205 U. S. 34, 51 L. ed. 696.  
Connelly vs. Union, etc., 184 U. S. 540, 46 L. ed. 679.  
Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. ed. 832.  
Dent vs. West Virginia, 129 U. S. 114, 32 L. ed. 623.

in view of the fact that the Constitution secures to the citizen the right to remove from one state to another and carry his property with him without molestation or hindrance,

Twining vs. New Jersey, 211 U. S. 78, 53 L. ed. 97.

Williams vs. Fears, 179 U. S. 270, 45 L. ed. 186.

Blake vs. McClung, 172 U. S. 239, 43 L. ed. 432.

Lottery cases, 188 U. S. 321, 47 L. ed. 492.

and "the rights of property are united with the rights of persons, and placed upon the same grounds by the fifth amendment to the constitution, which provides that no person shall be deprived of life, liberty or property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who committed no offense against the laws, could hardly be dignified with the name of due process of law."

Scott vs. Sandford, 19 Howard, 393, 15 L. ed. 691.

An osteopath or chiropractor, like any other citizen, is entitled to acquire and possess, use and enjoy property, and remove from one state to another and take his property along and use it in a lawful manner, and be secure in the possession and ownership of it until deprived of it by due process of law, which means, in other words, that he or she may "practice" the ordinary occupation of osteopathy or chiropractic anywhere in the United States in compliance with the reasonable regulations prescribed by the state in which the practice is done.

Reasonable regulation as prescribed by one state may by another state be regarded as unreasonable, to the utter confusion of the persons engaged in the occupation or business regulated, and the courts cannot inquire as to the motives which prompted the legislatures of the states in enacting any particular regulatory law, but must be content to presume that the legislatures acted in good faith and with full knowledge.

Ellis vs. United States, 206 U. S. 246, 51 L. ed. 1047.

McCray vs. United States, 195 U. S. 27, 49

L. ed. 78.

Florida etc. vs. Reynolds, 183 U. S. 471, 46

L. ed. 283.

the sole inquiry by the courts being to determine whether or not the legislatures acted within the scope of their powers under the constitution in enacting the law, and "it is a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, with full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

Atchison etc. R. Co. vs. Matthews, 174 U. S.  
96, 43 L. ed. 909.

So, if the legislatures keep within the scope of their constitutional authority, there can be forty-eight separate and distinct statutes to regulate the practice of a profession in the United States, and each one of the forty-eight may be absolutely different in their requirements and still be within the limits of the constitution.

If the enactment of a Uniform Medical Practice Act can be secured to regulate the practice of the art of healing throughout the whole Union, either by amendment to the Federal Constitution and laws enacted in conformity thereto, or by inducing the legislatures of the several states to enact an identical law in each state, all controversy over the matter of the rights of medical men and healers as citizens and artisans would come to an end, the science and art of healing would be placed upon an independent footing and fostered and supported by and in the interest of the whole nation, as it ought to be, and the rights and liabilities of the practitioners of the several schools (which subject will engage our attention in a subsequent article) would be defined and established to the everlasting benefit, satisfaction and contentment of the whole people.

Such a uniform law can be enacted in every state at an early date, and an amendment to the Federal Constitution can be had in due course, with all of the resultant benefit, if the medical men and the healers of all schools will sheathe their battle-axes and unite in a dignified effort to attain that result which is so necessary to the perpetuity of our institutions and the freedom and happiness of our people.

# THE BUSINESS TRUST

## THE SUPERIORITY OF THE DEVELOPED TRUST RELATION OVER THE STATUTE LAW CORPORATION

By James A. Crotty, President, American Trust Company, Chicago.

Most of the business public as well as a large number of the legal fraternity have but a very limited knowledge, if any, of the numerous decided advantages obtainable for and experienced in the conduct of a business under the basic law as compared to the disadvantages and grief attendant upon the carrying on of that same business under the statute law corporation form. Very few men realize that the common law Business Trust is the oldest method of transacting business on an organized basis that is known to civilization. Broad as this statement may be, it nevertheless is the truth.

### HISTORICAL

The modern Business Trust is the outgrowth of a creation of the ancient Chaldeans—the “use”—who handed it down to the Greeks. The Greeks handed it down to the Egyptians, they in turn to the Romans, and by the Romans to the Teutons. It received its highest form of development while in their hands until the principle was written into our own Federal Constitution. It was written into the English Law under what is known as the Statute of Uses. Application of the principle for the conduct of modern business in the United States for the past thirty years has brought it up to a very high state of perfection.

Up to the advent of the close of the Civil War, American business does not record the general use of much else than the old type of partnership organization in the transaction of the business of the country. The United States at the close of the Civil War, like all other nations emerging from a war, found itself stronger than when it entered the conflict. Considerable of this strength was due to the fact that in the prosecution of the war, vast natural resources were not only discovered but had then been merely scratched upon their surface.

Statesmen, economists and other public men then saw the necessity for the continued development of these resources in order to insure the maintenance of world supremacy which had just been attained and set about to accomplish the fostering of industry by legislation.

The practicability of such a policy was discussed at length and resulted in the decision to extend special privileges for certain purposes to groups of individuals under corporate charter. It was first thought that a national corporation act by Congress would accomplish this but as the question of State sovereignty had just been contested in a bloody conflict of four years, it was deemed advisable to leave the enactment of corporate statutes to the individual states. Many of the states then enacted corporation laws and for a period of about twenty years industry thrived under the protecting wing of these statutes.

### CORPORATE OPPRESSION BY STATUTE

But there came a change. Legislatures commenced to make other laws. Laws favoring corporate organization were changed or repealed. Purposes

for which incorporation was formerly allowed and encouraged were now conditionally or entirely denied. Many states even refused to permit corporations to hold real estate except by expensive special charter. Kentucky and Missouri regulated (?) the insurance companies out of their states. The taxes on corporate property were raised above the ratio for unincorporated property. As charters gave less and less rights and privileges, the more their cost was raised. Then came the fad of creating commissions to which legislatures delegated their regulative and punitive powers. California has now 63 of these commissions.

In the late '80s it became obvious that a fatal mistake had been made in the failure to enact a national corporation law in the beginning. From the early '90s restrictive, regulatory and punitive legislation was enacted that was directed at corporations. Statutes of this nature became more numerous with each succeeding session of every legislature and even now the end is nowhere in sight. We therefore perceive the spectacle of the parent (the legislature) strangulating its own child (the corporation) to a point beyond all hope of its recovery as an efficient agency of trade.

The Saturday Evening Post in its issue of May 9th, 1914, had this to say: "In this country, we have a government at war with business, not merely taxing and regulating but enforcing its own ideas as to how business should be organized. These ideas are mostly mere theory and are diametrically opposed to the tendency in business organization that springs from experience. The records of the Department of Justice show the extent of the government's war on business during the last six years and the bills now before Congress will provide newer and sharper weapons."

As an example of the fast diminishing "rights" of corporations; there were pending in the Congress in the summer of 1919, two pieces of restrictive industrial legislation known as the Kenyon and Kendrick Bills, against which numerous prominent organizations placed themselves on record, among whom were: the Union League Club of Chicago, the Chicago Association of Commerce, the Industrial Club of Chicago, the National Live Stock Exchange, the Illinois Manufacturers' Association and the Chicago Board of Trade.

A resolution of the Union League Club read, in part: "It is our opinion that the tendency toward restrictive legislation by Congress can have no other effect than to injure industry."

The Chicago Association of Commerce passed another, which in part read: "Regulatory or restrictive legislation of the character proposed in the so-called Kenyon and Kendrick Bills can have no other effect than to throttle, if not entirely destroy, the industry they are designed to correct."

All of these industries against which this legislation was sought to be directed were established under the corporation form of organization.

The question that naturally arises is—is there a form of organization that will enable the contributing associates to combine their capital and have transferable shares, with limited liability of shareholders and trustees, continuity of existence notwithstanding the death of a member or change in ownership of shares, and the other substantial powers of corporations together with the freedom from the statutory restriction, regulation and taxation imposed upon the corporation? The answer is yes. It is the Business Trust.

A court of last resort has held that the Business Trust "obtains for their

*associates the advantages belonging to corporations without the authority of any legislative act, and with the freedom from the restrictions and regulations imposed by law upon corporations."*

To a great many people this is something new and they need to be informed as to what a Business Trust is and wherein it differs from an incorporation.

### WHAT THE BUSINESS TRUST IS

The Business Trust is a creation of individuals in the exercise of their natural right to contract, and without legislative sanction. Every individual has natural powers and civil rights. These he does not derive from the state any more than he does his existence, and consequently may lawfully make any contract or do any act which is not forbidden by law. A Declaration of Trust is the exercise of that right. Individuals do not have to ask permission from the state to form a Business Trust. The grant of a franchise, if it be a franchise, to a corporation to have transferable shares, and issue stock with limited liability, or any like grant, does not deprive the citizen of his corresponding natural right to make such stipulations in the exercise of his right to contract; any more so than the franchise of a corporation to be, could possibly deprive him of his right to exist. These natural rights of the individual were generally recognized and in common use long before the statute law corporation came into existence. The Federal Constitution provides that no law shall be passed by the Congress or the Legislatures "impairing the obligations of contract," and this particular clause not only includes the right to make the contract, but as well the protection of it after it is made.

The courts of last resort, both Federal and State, are uniform in holding the character of a Business Trust as being of the same order as that of testamentary and voluntary trusts. In other words; that the trust estate, whether created by will or voluntary agreement, is purely a creation of contract and governed by the laws of contract, a fundamental principle of which is that all persons of lawful age and capacity may enter into and carry out any lawful agreement without leave or hindrance from any source. This inalienable right is vouchsafed by the Federal as well as the State Constitutions. It is under this guaranty that the Express Trust, as an agency of trade, has established its right to create and transact business anywhere and everywhere with freedom from all statutory exactions that may be imposed upon corporations. Corporations exist only by legislative creation and sanction—hence are subject to any requirement or restriction their creator may impose.

The Supreme Court of the United States, in an unbroken line of decisions, holds that a pure Business Trust, created under the Common (basic) Law, is not a "Company", "Association", "Joint Stock Company", "Corporation", or "Partnership", but a "Trust Estate" deriving its powers from the instrument (contract) of its creation, and governed by the rules of equity as construed and applied by courts of equity jurisdiction.

### SOME NOTABLE EXAMPLES

Many representative lines of American business are now, and for many years have been, conducted under this form. A few of the better known are: Massachusetts Electric Companies, organized with a capital of \$24,000,000,



Associated Simmons Hardware Companies, of St. Louis, Mo., (the largest hardware company in the world), Stevenson Lumber Co. of Michigan, organized by Senator Stevenson, North American Pulp & Paper Co., Adams Express Company, The MacKay Co., American Express Company, American Trust Company, Chicago Elevated Railroads, Chicago City Railway Co., Masonic Temple Building Trust, Central Manufacturing District (capital \$50,000,000) of Chicago, Edward Hines Lumber interests, Wachusett Realty Trust, Postal Telegraph Co.,—and numerous others.

Men organize business to get something, privileges, freedom from personal liability, negotiable shares, continuous succession. This the Business Trust gives them. The Corporate Law DOES NOT, any more, except partially, with increasing expense and with killing restrictions. What you WANT and WHAT YOU GET do not come together any more in the corporation. They DO in the Business Trust.

Fletcher, in his work on corporations, has this to say concerning the advantages of the Business Trust over the corporation:

1. The doing of business upon the common law right of contract with freedom from all statutory exactions that may be imposed upon corporations, both foreign and domestic, as merely artificial persons.

2. The right of trustees to apply to courts for direction in the execution of their powers, whereby their acts are given legal certainty in advance of their commission.

3. The protection of cestuis que trustent in their dealings with trustees, their right to accountings and full information, without the right, however, of securing information for improper purposes.

4. The protection of creditors in "following" the "trust fund" and their right against trustees individually in cases of fraud.

5. The freedom with which the terms of a trust instrument may be framed for the conduct of a particular business and according to the lawful preference of its equitable owners.

6. Latitude in amendment of provisions of management, as experience may show is desirable.

7. The winding up of a business expeditiously and without resort to proceedings at law, with their consequent burden of delay and expense, under express provisions of the trust instrument, upon any termination of the trust.

Neither time nor space are adequate here to dwell fully upon all of the features of a trust estate engaged in active business. However, the main points are touched upon in such manner as will enable the reader to become acquainted with and convinced of the fundamental facts relative to the claim of its superiority over the corporation as an agency of trade.

The Business Trust is known variously as a "Massachusetts Trust", "Business Trust Estate", "Common Law Trust", "Express Trust", and "Common Law Company". The following is a brief of the law on the subject.

#### THE COMMON LAW COMPANY

There has always existed in the Common Law of nations what is technically known as the "common law trust" relation, the conveying of property or things by one person or persons to another person or group of persons, to be held, used, managed, conveyed for the benefit and profit of still a third

person or persons, or for the benefit and profit of the party or parties conveying, together with these third parties. The right to create this relation lies in the right of contract, which is constitutionally guaranteed.

This is distinguished from corporate rights and powers, which are legislatively derived rights and powers, not natural rights, not guaranteed by the Constitution.

The domain of law that has grown up around the "express trust relation" through decades and centuries of interpretation by Courts of Equity, both here and in England, is peculiarly the realm of Equity. From the time of the Statute of Uses down, the Equity Courts of last resort both in England and this country have told Parliament and Congress and Legislatures that this domain of law lies without their power to restrict.

Particularly with respect to the present form of the Common Law Company, both the courts of last resort in England and the United States have rendered decisions that indicate that any legislative act restricting business organizations, no matter how inclusive such act may be worded, will be interpreted to apply only to such business organizations that legislatures have created or have power to create, and cannot apply to business organizations which derive neither their power nor their existence from legislative enactment.

A statute passed by an Act of Parliament of England in 1862, was intended apparently to include within its terms every form of organized human activity which language could imagine. In *Smith vs. Anderson*, 15 Ch. D 247, Court of Appeals 1880, was rendered a decision which is now the established law of England.

The Trust Deed provided for the purchase by Trustees of shares in the capital stock of eleven different sub-marine telegraph companies. The money was to be furnished by subscribers to whom transferable certificates were to be issued. It was held that this was a trust and not a company, association or partnership which had to be registered under the Companies Act 1862 (25 & 26 Vict. C 89, Sec. 4). That act provided that "No company, association or partnership shall be formed for the purpose of carrying on any other business (that is to say, any business other than banking) that has for its object the acquisition of gain by this company, association or partnership, or by the individual members thereof unless it is registered". This conclusion was reached on the ground that there is a difference between a partnership where money was raised by the issue of transferable certificates which is to be held by so-called trustees who are really managing agents, and a trust where money raised by the issue of transferable certificates is to be held by trustees properly so-called, and that the distinction between the two is defined in re *Thomas* 14 Q. B. Ch. D. 379, 383; and in re *Faure Electric Acc. Co.* 40 Ch. D. 141, 151, 152 (England). So also *Williams vs. Milton*, 215 Mass. 1.

A statute, known as the excise or "Corruption Tax Law," was passed by Congress including in specific terms all forms of business organizations, corporations, etc., organized under the laws of the States, Alaska, District of Columbia, or "formed under the laws of the land."

In *Elliott vs. Freeman*, 220 U. S. Sup. Ct. Rep. 178, the court determined that the language of the statute cannot be interpreted to include a Common

Law Company, because said companies derive neither their rights nor their existence from legislative enactment.

So much for the foundation of the Common Law Company, upon this "common law trust" relation as a skeleton, some of the country's greatest organization experts (note the name of Richard Olney among the signatures of the Massachusetts Electric Companies. Richard Olney was one time Attorney General of the United States, later Secretary of State of the United States, and still later was appointed by President Wilson first Governor of the Federal Reserve Board under the new banking law, a position he did not accept although the appointment ranks in importance with a seat on the bench of the Supreme Court of the United States,) upon the "common law trust" relation as a skeleton, these experts proceeded to engraft the advantages and efficiencies that have proven so useful to business in the statutory law corporation form of organization, and it became the Common Law Company.

Particularly note, that following the older law of trustee and cestui trust, the Courts of Equity, between boards of trustees and shareholders of Common Law Companies, **ACTUALLY ENFORCE** the relation,—the relation that **SHOULD HAVE EXISTED** between director and shareholder of a statutory corporation.

Not depending upon legislative enactment for existence and privileges, the restrictive, regulative, double taxing laws applied to legislatively-formed organizations, do not apply to Common Law Companies any more than they do to an individual.

A Common Law Company is not a co-partnership. *Lindley in Partnership*, Vol. 1, p. 1, states that an exact definition of partnership at common law is impossible. In a partnership, the partners stand towards that enterprise in the relation of co-proprietors. It is evidenced by their power to control the operations of the enterprise through their control of the trustees. In a trust, the beneficiaries have only the right to compel the trustee to account (*Weaver vs. Fisher*, 110, 111, 146; *Hayes vs. Hall*, 188 Mass. 510), and to charge him with the consequence of dishonesty or neglect (*Barker vs. Barker*, 14 Wis. 131), and cause his removal for the one offence or the other (*Scott vs. Rand*, 118 Mass. 215.)

If the trustees act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership, *Williams vs. Milton*, 215 Mass. 1, *Frost vs. Thompson*, 219 Mass. 360.

Associations for profit with transferable shares (i. e. Common Law Companies), hold a position between corporations and partnerships. In re *The Ass. Trust*, 222 Fed. 1012 Mass. *Spottswood vs. Morris*, 12 Idaho 360; *Husack vs. Development Ass.* 224 Ill. 274; *Cox vs. Bodfish*, 35 Me. 302; *Cincinnati Co. vs. Citizens Bank*, 11 Ohio, Dec. 50; *Tenney vs. N. E. Protective Union*, 37 Vt. 64.

Common Law Companies have all the rights of individuals in business, plus the advantages usually belonging to corporations, and with only the restrictions applying to individuals. They are peculiarly under the jurisdiction of the Courts of Equity. *Car vs. Norton*. 139 Mass. 250; *Wemy. vs. White*.

159 *Mass.* 484; *Howe vs. Moore*, 174 *Mass.* 491; *Hussey vs. Arnold*, 185 *Mass.* 202.

A Common Law Company is created by Articles of Agreement and Declaration of Trust made by the original shareholders themselves; and they can mould it and give it any shape they choose, and may provide for the appointment of successors to the first trustees upon such terms as they may choose to impose. *Richert vs. Missouri*, Oct, 251, *Ill.* 238; *Moore vs. Trael*, 116 *Mo.* 383; *Lake vs. Brown*, 116 *Ill.* 83; *Howard vs. Tracey*, 116 *Mo.* 631; *Shaw vs. Paine* 12 *Allen*, 293.

Trustees can fill board in case of resignation, disqualification, or other cause. Not necessary to have meetings of shareholders. Can call special meetings of shareholders for removal of trustees. Articles of Agreement are valid and binding at Common Law regardless of statute. *Spraker vs. Platt*, 145 *N. Y.* 440.

The shareholder's right is purely an equitable right—the right to have the property managed and controlled for his own and his assign's benefit by the board of trustees. The certificate evidencing his equitable interest is merely "written evidence of the existence and measure of his equity," and as such is not taxable. *Hussey vs. Arnold*, 185 *Mass.* 202.

Shares cannot be taxed to the owner. They represent an undivided interest in the net assets of the association. *Headley vs. Co. Com.* 105 *Mass.* 519; must be assessed in the town of its principal place of business. *Ricker vs. Am. L. & T. Co.* 140, *Mass.* 346; *Williams vs. Boston*, 208 *Mass.* 497.

The shareholder is not personally liable for the debts of the company. *Hussey vs. Arnold* 183 *Mass.* 202; *Williams vs. City of Boston* 215 *Mass.* 1; *Wells-Stone Co. vs. Grover*, 7 *N. D.* 460; 75 *N. W.* 914; *Industrial Co. vs. Texas* 31 *Roz. Cit. App.* 375.

If the Declaration of Trust is properly drawn, there is no personal liability of shareholders, as there is no partnership obligations. It is a *Trust Estate*, and not a co-partnership. *Mayo vs. Mority*, 151 *Mass.* 481. The nature of the association gives notice of the limitation of its members. *Volger vs. Ray*, 131 *Mass.* 439.

When the actual trust relation has been created, the trustee is not at all the agent of the shareholders. *Wells-Stone Merc. Co. vs. Grovers Supra.*

The trustees are personally liable for the debts of the company ordinarily, but they may stipulate that they shall not be, and such stipulation—which is included in all Common Law Companies' articles—is effective to free the trustee from personal liability. *Shoe & Leather National Bk. vs. Dix*, 125 *Mass.* 148; *Glenn vs. Allison*, 58 *Id.* 527; *Smith vs. Ayer*, 101 *U. S.* 320; *Wodrow vs. Weed*, 154 *Pa.* 307; *Mason vs. Pomeroy*, 151 *Mass.* 184; *Bank of Topeka vs. Eaton*, 100 *Fed.* 8; *Aff.* 107 *Fed.* 1003; *Hotchin vs. Kent*, 8 *Mich.* 526.

Cases *supra* also show the method of creditors following the company property through the trustees' right of indemnity. *Fogg vs. Blair*, 133 *U. S.* 534.

Common Law Companies are not subject to any tax that a corporation is subject to as a corporation. Only the same tax as individuals. *Elliott vs. Freeman*, 220 *U. S.* 178; *People ex Darrow vs. Coleman*, 118 *N. Y.* 157; *Anthony vs. Casewell*, 15 *R. I.* 159; *Burroughs vs. Marshall*, 36 *Pa.* 397; *Williams vs. Boston*, 208 *Mass.* 497.

A corporation has no existence outside of the State which creates it. Corporations do business in other than their own home state merely by sufferance. *Augusta vs. Earle*, 38 U. S. 519.

Common Law Companies, on the other hand, do business in any and all states as a constitutional right, and no state can interfere with it. *Boby vs. Smith*, 131 Ind. 342; *Shir vs. Lafayette*, 52 Fed. 857; *Farmer's L. & T. Co. vs. Chicago R. Co.* 27 Fed. 146.

A shareholder (*cestui quo trust*) is not prohibited from occupying the position of trustee for his own benefit. *Nellis vs. Rickard*, 133 Cal. 617; *Taylor vs. Mayre*, 95 Cal. 160; *Burbach vs. Burbach*, 217 Ill. 547; *Sory vs. Palmer*, N. J. Eq. 1; *Robinson vs. DeBrulateur*, 188 N. Y. 301.

Especially is this so when he is one of several trustees. *Rogers vs. Rogers*, 111 N. Y. 288;

Or when he is trustee for himself and others. *Woodward vs. James* 115 N. Y. 346; *Bolles vs. St. Co.* 27 N. J. 308; *Burbach*, 217 Ill. 547.

Further, if the trust has once been created by the separation of the legal and equitable titles or estates in different persons, it will not be destroyed by the appointment of the beneficiary himself as successor to the original trustee. *Losey vs. Stanley*, 147 N. Y. 660; *Rogers vs. Rogers*, 111 N. Y. 228.

Whoever has the power of appointment of trustees, the Court of Equity has jurisdictional control of the exercise of the power, so far at least as to prevent an abuse of discretion. (Note the great advantage of this feature over a corporation.) *Batley vs. Bailey*, 2 Del. Ch. 95; *Orr vs. Yates*, 209 Ill. 222; *Butler vs. Taggart*, 27 Ky. L. Rep. 708; *March vs. Romare*, 116 Fed. 355.

Should the parties empowered fail or refuse to appoint trustees, a Court of Equity, by its general inherent power over trusts, has power to appoint if necessary. It is a settled rule of equity that no trust shall fail for want of a trustee. *Blackeny vs. DeBoies* 187 Ala. 627; *Tatjo vs. Swassy*, 111 Cal. 628; *Treats app.* 30 Conn. 113; *Griffith vs. State*, 2 Del. Ch. 421; *Bruswell vs. Downs*, 11 Fla. 62; *Harris vs. Brown*, 124 Ga. 310; *Bennett vs. Bennett*, 217 Ky. 434; *in re Freeman* 146 La. 38; *Roche vs. George*, 93 Ky. 609; *Herrick vs. Low*, 103 Mo. 363; *Dodge vs. Dodge*, 109 Md. 164; *Neville vs. Detroit*, 104 Mich. 140; *Rettenberger vs. Garrett*, 224 Mo. 191; *Hayward vs. Spalding*, 75 N. H. 92; *Adams vs. Adams*, 21 Wal. 185; *Dockin vs. Brunt*, L. R. 6 Eq. 506.

The Court of Equity may even, through its own officers and agents, execute the trust. *Cases Supra*.

Compensation of trustees and officers may be fixed in the articles. *Bowker vs. Pierce*, 130 Mass. 262; *Ladd vs. Piggott*, 215 Mo. 361; *Briscoe vs. State*, 23 Ark. 493; *Jarrett vs. Johnson*, 215 Ill. 112.

One of the advantages of the Common Law Company is the right of trustees to apply to a Court of Equity for instruction in the execution of their trust. *Diggs vs. Fidelity*, 112 Md. 50; *Hoagland vs. Cooper*, 65 N. J. Eq. 407; *Mersman vs. Mersman*, 136 Mo. 244.

A corporation to issue bonds gets the best legal opinion obtainable as to legality, and at times even this opinion proves wrong and the bonds are either never issued or afterwards fall on the market.

A Common Law Company can apply to a Court of Equity for instruction in a like case, and the question of legality is definitely settled in advance of issue. *Diggs vs. Fidelity*, 122 Md. 50; *Thorn vs. Debruteil*, 179 N. Y. 64.

After a review of the law as laid down in the cases cited above, a refer-

ence to the forms accompanying, and to the forms of the Common Law Companies already doing business, will show with what consummate skill the old established law has been adapted to this engine for modern up-to-date business: the Common Law Company.

The later decisions will also demonstrate with what apparent relief the courts themselves turn to this new solution of the almost inextricable muddle into which careless legislation has plunged the corporate form of business organization.

#### THE RIGHT OF INTERSTATE COMMERCE

In *British Ruling Cases*, Volume 6, page 782, we find: The defendants were a foreign corporation carrying on business in Sweden as manufacturers. They employed as their sole agents in the United Kingdom a firm in London who also acted as agents for other firms and carried on business as merchants on their own account. The agents had no authority generally to enter into contracts on behalf of the defendants, but they obtained orders and submitted them to the defendants for their approval. On being notified by the defendants that they had accepted the orders, the agents signed contracts with the purchasers as agents for the defendants. The goods were shipped direct from the defendants in Sweden to the purchasers. The agents in some cases received payment in London from the purchasers and remitted the amount to the defendants less their agreed commission.

HELD, that the defendants were not carrying on their business at the agents' office in London so as to be resident at a place within the jurisdiction, and that service of a writ on the agents at their office was, therefore, not a good service on the defendants.

*Grant vs. Anderson* (1892) 1 Q. B. 108, 61, L. J. Q. B. N. S. 107, 66 L. T. N. S. 79, followed.

NOTE—May a foreign corporation having an agent to solicit business or to receive and transmit orders be deemed to carry on business within the jurisdiction.

In order to avoid blurring the outlines of the present discussion, this note cites only decisions involving the state of facts indicated by its title, and does not include cases which consider the question whether a foreign corporation having an agent with authority to enter into contracts or to complete sales in its behalf, or consigning goods to factors or other "sales agents" selling on their own account, may be regarded as doing business within jurisdiction.

As to whether transactions pursuant to agreement with local dealers to sell product of foreign corporation within state constitute doing business therein, see note in 44 L. R. A. (N. S.) 1094.

As to whether establishing an agency to handle a corporation's product within a state constitutes doing business therein, see note in L. R. A. (N. S.) 142.

As to whether the sale by a foreign corporation of goods stored in the state is interstate business, see note in 18 L. R. A. (N. S.) 134.

The practise of some courts to treat the question: What constitutes doing business? as an undivisible one, overlooking the fact that the phrase "doing business" does not and cannot have a uniform and unvarying meaning, but is governed largely by the connection and in view of the object of the statutes under construction,—and the necessity of explaining their de-

cisions,—has led to the bringing together in this note two distinct questions: First, Whether the solicitation of business or taking of orders subject to acceptance constitutes doing business in the jurisdiction within the meaning of the statutes imposing license fees or requiring foreign corporations doing business within the jurisdiction to meet certain other requirements; and second: Whether such circumstances give the corporation such a constructive presence within the jurisdiction as to render it suable there.

As subjecting corporation to statutory requirements.

Unfortunately for the superficial reader, many of the decisions which hold that the solicitation of business and taking of orders by foreign corporations through agents does not subject such corporation to statutory requirements imposed upon foreign corporations doing business within the jurisdiction; couch the conclusion in the phraseology that such course of dealing does not constitute doing business within the state, when what is meant is that the transactions in question, being incidental to interstate commerce, are protected by the commerce clause from the operation of such statutes. That this is the reason is demonstrated, not only by the course of reasoning in many of the decisions, but by the circumstances that where the requirement in question is not regarded as restrictive of interstate commerce, or the case has been taken out of the scope of the commerce clause by the operation of the Wilson Act, the taking of orders for goods subject to approval of the corporation at its home office has been held to be doing business within the state notwithstanding it is also interstate commerce.

The exemption of foreign corporations merely soliciting business within the state from the operation of the statutes of the kind in question may be perhaps put upon the ground other than that such solicitation is an incident of interstate commerce; since it may be fairly said to be not doing business at all, but to be simply an effort to secure business to be done elsewhere.

The taking of orders by traveling salesmen (*International Trust Co. vs. A. Leschin & Sons Rope Co.* (1907) 41 Colo. 299, 92 Pac. 727, 14 Ann. Cas. 261; *Belle City Mfg. Co. vs. Frizzle* (1905) 11 Idaho 1; 81 Pac.; *Lehigh Portland Cement Co. vs. McLean* (1910) Ill. 326, 137 Am. St. Rep. 322, N. E. 248; *March-Davis Cycle Mfg. Co. vs. Strobbridge Lithographing Co.* (1898) 79 Ill. App. 683; *Havens & G. Co. vs. Diamond* (1900) 93 Ill. App. 557; *Pressed Radiator Co. vs. Hughes* (1910) 155 Ill. App. 80; *American Sales Book Co. vs. Wemple* (1912) 162 Ill. App. 639; *Ajax-Grieb Rubber Co. vs. Gray* (1913) 179 Ill. App. 377; *Frank Prox Co. vs. Bryan* (1914) 185 Ill. App. 322; *West Coast Timber Co. vs. East St. Louis Pub. Co.* (1914) 190 Ill. App. 581; *Mutual Mfg. Co. vs. Alpaugh* (1910) 174 Ind. 381, 91 N. E. 504; *rehearing denied in* (1910) 174 Ind. 387, N. E. 113; *Com. vs. Hogan, M. & T.* (1903) 25 Ky. L. Rep. 41, 74 S. W. 737; *Coit & Co. vs. Sutton* (1894) 102 Mich. 324, 25 L. R. A. 819, 4 Inters. Com. Rep. 768, 60 N. W. 690; *Moline Plow Co. vs. Wilkinson* (1905) 105 Mich. 57, 62 N. W. 1119; *M. I. Wilcox Cordage & Supply Co. vs. Mosher*, (1897) 114 Mich. 64, 72 N. W. 117; *Rock Island Plow Co. vs. Peterson* (1904) 93 Minn. 356, 101 N. W. 616; *American Bridge Co. vs. Honstain* (1910) 113 Minn. 16, 128 N. W. 1914; *S. A. Maxwell & Co. vs. Edens* (1896) 65 Mo. App. 439; *Greenbrier Distillery Co. vs. Van Frank* (1910) 147 Mo. App. 204, 126 S. W. 222; *F. N. Ellis Lumber Co. vs. John* (1911) 152 Mo. App. 516, 133 S. W. 633; *Low vs. Davy* (1912) 83 N. J. L. 540, 83 Atl. 869; *Droege vs. Aherns & Co. Mfg. Co.* (1900) 163 N. Y. 466, 57 N. E. 747; *Murphy Varnish*

*Co. vs. Connell* (1894) 10 Misc. 553, 32 N. Y. Supp. 492; *Rallapoosa Lumber Co. vs. Holbert* (1896) 5 App. Div. 559, 39 N. Y. Supp. 432; *American Broom & Brush Co. vs. Addicks* (1896) 19 Misc. 36, 42 N. Y. Supp. 871; *National Knitting Co. vs. Brenner* (1897) 20 Misc. 125, 35 N. Y. Supp. 714; *Vaughn Mach. Co. vs. Lighthouse* (1901) 64 App. Div. 138, 71 N. Y. Supp. 799; *Cummer Lumber Co. vs. Associated Mfgs. Mut. F. Ins. Corp.* (1901) 67 App. Div. 151, 73 N. Y. Supp. 668, affirmed without opinion in (1903) 175 N. Y. 633, 66 N. E. 1106; *Jones vs. Keeler* (1903) 40 Misc. 685, 83 N. Y. Supp. 189; *St. Albans Beef Co. vs. Aldridge* (1906) 112 App. Div. 803, 99 N. Y. Supp. 463; *L. C. Page Co. vs. Sherwood* (1910) 65 Misc. 543, 120 N. Y. Supp. 837, (1911) 146 App. Div. 618, 131 N. Y. Supp. 322 Reversing (1910) 125 N. Y. Supp. 1100; *Osborne Co. vs. Walter* (1915) 155 N. Y. Supp. 434; *Toledo Commercial Co. vs. V. J. Howard & Co.* (1896) 55 Ohio St. 217, 45 N. E. 197; *M. D. Wells Co. vs. V. J. Howard & Co.* (1915) Okla. 151, Pac. 618; *Hollister vs. National Cash Register Co.* (1916) Okla. 154 Pac. 1157; *Bertin & Leopoldi vs. Mattison* (1914) 69 Or. 470, 139; Pac. 330; *Vermont Farm Mach. Co. vs. Hall* (1916) Or. 158 Pac. 1073; *W. B. Mershon Co. vs. Pottsville Lumber Co.* (1895) 187 Pa. 12, 67 Am. St. Rep. 560, 40 Alt. 1019; *Blakesley Mfg. Co. Milton* (1896) 12 Pa. Co. Ct. 553, affirmed in (1897) 5 Pa. Super. Ct. 184; *Hall's Safe Co. vs. Walenk* (1910) 42 Pa. Super. Ct. 576; *DeWitt vs. Berger Mfg. Co.* (1904) Tex. Civ. App. 81 S. W. 334; *Erwin vs. DuPont Nemours Powder Co.* (1913) Tex. Civ. App. 156 S. W. 1097; *Maury-Cole Co. vs. Lockhart Grocery Co.* (1915) Tex. Civ. App. 175 S. W. 262; *Latham Co. vs. Louer Bros.* (1915) Texas Civ. App. 176, S. W. 920; *Underwood Typewriter Co. vs. Piggott* (1906) 60 W. Va. 532, 55 S. E. 664; *Davis & R. Bldg. & Mfg. Co. vs. Dix* (1874) 64 Fed. 406; *Brumer vs. Kansas Moline Plow Co.* (1909) 93 C. C. A. 504, 168 Fed. 218, affirming (1907) 7 Ind. Terr. 506, 104 S. W. 816; *Culbert vs. McCall Co.* (1911) 40 N. B. 385. *Central re Goulds Mfg. Co.* (1894) 14 Pa. C. Ct. 179 (*Local Agents*) N. B. Inderieden Co. vs. J. C. Johnson Co. (1910) 112 Minn. 469, 128 N. W. 570; *Harvard Co. vs. Wicht* (1904) 99 App. Div. 507, 91 N. Y. Supp. 48; *Rundle Spence Mfg. Co. vs. Gainsborough Constr. Co.* (1910) 123 N. Y. Supp. 585; *Fruit Despatch Co. vs. Wood* (1914) 42 Okla. 79, 140 Pac. 1138; *Spider Lake Saw Mill & Lumber Co. vs. Geisel* (1908) 19 Pa. Dist. R. 959; *Blakeslee Mfg. Co. vs. Hilton* (1897) 5 Pa. Super. Ct. 184 (dictum) *Federal Glass Co. vs. Lorentz* (1913) 49 Pa. Super. Ct. 585; *Wagner vs. J. & G. Meakin* (1899) 33 C. C. A. 577, U. S. App. 475, 92 Fed. 76; *Kirvin vs. Virginia-Carolina Chemical Co.* (1906) 76 C. C. A. 173, 145 Fed. 288, 7 Ann. Cas. 219; *Smith & Co. vs. Dickinson* (1914) 81 Washington 465, 145 Pac. 1133, a shipping agent; *Thomas Mfg. Co. vs. Thede* (1914) 186 Ill. App. 284, or brokers; *Sleepy Eye Mill Co. vs. Hartman* (1913) 184 Ill. App. 308; *Chase Engine & Mfg. Co. vs. Vromania Apartment Co.* (1911) 154 Me. App. 139, 133 S. W. 684; *Corn Products Mfg. Co. vs. Western Candy & B. Supply Co.* (1911) 156 Me. App. 110, 135 S. W. 985; *Dinuba Farmers' Union Packing Co. vs. J. M. Anderson Grocer Co.* (1916) 193 Mo. App. 236, 182 S. W. 1036; *Fresno Home Packing Co. vs. Turle & Skidmore* (1908) 60 Misc. 79, 111 N. Y. Supp. 839 affirmed without opinion in (1909) 132 App. Div. 930, 117 N. Y. Supp. 1134; *Acorn Brass Co. vs. Rutenberg* (1911) 147 App. Div. 533; 132 N. Y. Supp. 600; *Filmer Bros. Co. vs. Singer* (1914) 149 N. Y. Supp. 904, *Lederworks vs. Capitelli* (1915) 92 Misc. 260, 155 N. Y. Supp. 651 *McBath vs. Jones Cotton Co.* (1906) 79 C. C. A. 203, 149 Fed. 383, or commission merchants (*Waller vs.*



*Rothfield* (1901) 36 Misc. 177, 73 N. Y. Supp. 141) subject to the approval of the corporation at its home office, and filled by shipments made from without the state, have for the reason above stated, been held not to be doing business within the state, so as to subject the corporation to the requirements imposed by statute upon foreign corporations doing business within the state.

The mere fact that a foreign corporation has an agent in the state, and that the agent has an office, does not have the effect to establish that the corporation is doing business within the state. (*Pressed Radiator Co. vs. Hughes* (1910) 155 Ill. App. 80; *J. B. Inderrieden Co. vs. J. C. Johnson* (1910) 112 Minn. 469, 128 N. W. 570; *Vaughn Mach. Co. vs. Lighthouse* (1901) 64 App. Div. 138, 71 N. Y. Supp. 799; *Fresno Packing Co. vs. Turtle & Skidmore* (1908) 60 Misc. 79, 111 N. Y. Supp. 839, affirmed without opinion in 132 App. Div. 930, 170 N. Y. Supp. 1134; *L. C. Page Co. vs. Sherwood* (1910) 65 Misc. 543, 120 N. Y. Supp. 837; *Acorn Brass Mfg. Co. vs. Rutenberg* (1911) 147 App. Div. 533, 132 N. Y. Supp. 600); nor does the fact that the corporation itself maintains a local office for the solicitation of business (*System Co. vs. Advertisers' Cyclopedic Co.* (1910) 121 N. Y. Supp. 611), or for the taking of orders, which are transmitted to the state of the corporation and there filled, and the goods thence shipped (*Spider Lake Saw Mill Co. vs. Goessel* (1908) 19 Pa. Dist. R. 959; *M. E. Smith & Co. vs. Dickinson* (1914) 81 Wash. 465, 142 Pac. 1133). So, the fact that an office is maintained in the state as headquarters for its salesmen, the expense of the maintenance of which, including rent, is charged to the salesmen, is immaterial. *American Art Works vs. Chicago Picture Frame Works* (1914) 184 Ill. App. 502, affirmed in (1914) 204 Ill. 610, 106 N. E. 440. *It is immaterial that the name of the corporation appears in both the telephone and city directories, together with that of the agent as its representative, where this is only incidental to the transaction of interstate business.* *M. E. Smith Co. vs. Dickinson* (1914) 81 Wash. 465, 142 Pac. 1133; or that the lease of the telephone was made in the name of both the corporation and the agent, *Gilmer Bros. vs. Singer* (1914) 149 N. Y. Supp. 904. Providing an agent with an office as a convenient place for supervising, solicitors of orders for sales, and as a kind of base for advertising, while a circumstance to be considered with other pertinent facts, will not alone determine the nature of the corporation's business. *Vermont Farm Machine Co. vs. Hall* (1916)—or 156 Pac. 1073. But a corporation which requires its general agent in the state to maintain an office under and in the name of the company, all records and data of which are to belong exclusively to the company, the expense of maintaining which is to be paid by him out of his commission, may be considered as doing business within the state notwithstanding the orders obtained by the agent, provided that they are subject to the acceptance of the company at its home office. *American Cash Register Co. vs. Griswold* (1911) 143 App. Div. 907, 128 N. Y. Supp. 206, reversing (1910) 68 Misc. 379, 129 N. Y. 723, 100 N. E. 1124.

A foreign corporation having no place of business, no office, and no stock of goods, and which simply consigns goods to merchants for sale, the contracts for sale being subject to the approval of the corporation in another state, is not doing business within the state within the meaning of the statute requiring foreign corporations doing business within the state to file a certificate. *Chase-Hackley Piano Co. vs. Griffin* (1914) 149 N. Y. Supp. 998.

A contract signed in Michigan by the parties (one of them is a foreign

corporation which signed by its agent) which stipulated that it shall not be valid until approved at the principal office of the corporation in Ohio, is not, when so approved in Ohio, a contract made in Michigan within the statute invalidating contracts made by foreign corporations which have not filed their articles and paid a franchise tax. *Holder vs. Aultman M. & T. Co.* (1898) 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269.

Receiving subscriptions to a newspaper published in another state by a corporation, or collecting the money therefor, is not doing business within the state within the meaning of the constitutional provision prohibiting foreign corporations from doing any business in the state to have a known place of business and an authorized agent within, and to file a certified copy of their articles of incorporation with the Secretary of State. *Mertins vs. Hubbel Pub. Co.* (1914) 190 Ala. 311, 67 So. 275.

The acts of the agent of a foreign corporation in soliciting advertisements within the state subject to the approval of the corporation do not constitute doing business within the state within the meaning of a statute regulating the admission of foreign corporations to do business. *Journal Printing Co. vs. Inter-Ocean Newspaper Co.* (1912) 167 Ill. App. 274; *Bell Telph. Co. vs. Galen Hall Co.* (1909) 77 N. J. L. 253, 72 Atl. 47; *American Contractor Pub. Co. vs. Baggs* (1904) 91 N. Y. Supp. 73; *System Co. vs. Advertisers' Cyclopedic Co.* (1910) 121 N. Y. Supp. 611; *American Contractor Pub. Co. vs. Nocenti* (1913) 13 N. Y. Supp. 853.

On the other hand in *Saxony Mills vs. Wagner* (1909) 94 Miss. 233, 25 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 47 So. 899, 19 Ann. Cas. 199, it was held, apparently upon the authority of the cases which held that under similar circumstances a corporation cannot be considered as doing business within the state within the meaning of the statutes imposing certain requirements upon foreign corporations doing business within the state, that a corporation cannot be said to be doing business within the state from the mere fact that it sells goods there through the efforts of traveling salesmen, so as to bring it within the jurisdiction of the state courts.

And in *Williams Grace Co. vs. Henry Martin Mach. Co.* (1909) 98 C. C. A. 167, 174 Fed. 131, it was held, largely upon the authority of the same class of cases, that a foreign corporation soliciting orders within the state, to be submitted to it for approval, was not doing business within the state within the meaning of a statute providing for the service of process upon corporations by delivery thereof to their agents.

A foreign corporation which, at the solicitation of a broker, has furnished him with prices on its goods, and which has made sales through him to be delivered on board cars at the factory at a price made by him by adding his commission to the quoted prices is not doing business within the state so as to give local courts jurisdiction of an action against it. *Doe vs. Springfield Boiler & Mfg Co.* (1900) 44 C. C. A. 128, 105 Fed. 684.

It has been held that the fact the corporation maintains an office within the state, in charge of a salaried sales agent who takes his orders for goods to be accepted and filled by the corporation at its home office, does not constitute a doing business within the state so as to subject the corporation to the jurisdiction of the local courts. *Case vs. Smith, L. & Co.* (1907) 152 Fed. 730; *N. K. Fairbanks & Co. vs. Cincinnati, N. O. & T. P. R. Co.* (1892) 4 C. C. A. 403, 9 U. S. App. 312, 54 Fed. 420.

The generally, although not universally accepted, view seems to be that the mere solicitation of business within a state, unconnected with a sale or local performance of contract obligations, does not give the corporation presence within the state for the purpose of service of process.

Thus, a railroad company not having any line in the state is not by reason of its employment of an agent whose business it is to solicit passenger and freight traffic, and its maintenance of an office with clerical assistance for its use, doing business within the state and as such liable to suits therein, *North Wisconsin Cattle Co. vs. Oregon Short Line R. Co.* (1908) 105 Minn. 198, 117 N. W. 381.

And see also to the same effect, *Earle vs. Chesapeake & Co. R. Co.* (1908) 127 Fed. 235; *Marwell vs. Atchison T. & S. F. R. Co.* (1888) 34 Fed. 286; *Booz vs. Texas & P. R. Co.* (1911) 250 Ill. 376, App. 242.

Soliciting through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railroad company incorporated in Iowa and having its eastern terminal at Chicago, is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there. *Green vs. Chicago B. & Q. R. R. Co.* (1907) 805 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 593.

The act of a railroad company in constituting agents with no power or authority to bind it, but simply to solicit traffic for it, is not "doing business" within a constitutional provision fixing the venue of suits against a foreign corporation "in any country where it is doing business by service of process upon an agent anywhere in the state" or within a statutory provision fixing the venue "in any county in which it does business by agent". *Abraham Bros. vs. Southern Railroad Co.* (1906) 149 Ala. 547, 42 So. 837.

In *Berger vs. Penna. R. R. Co.* (1906) 27 R. I. 583, 9 E. R. A. (N. S.) 1214, 65 Atl. 261, 8 Ann. Cas. 941, it was held that a foreign railroad company having no transportation line within a state is not doing business there within the meaning of the statutes providing for service of process on a foreign corporation doing business within the state by serving its agent by maintaining within the state an agency to solicit shippers to direct a local carrier to whom property is delivered for transportation to bill it over the line of such foreign corporation. The court, as authority for so holding, cited a number of cases in which it has been held that the mere solicitation of business by agents of a foreign corporation is not "doing business" within the state as to subject the corporation to the requirements of the statutes prescribing the conditions upon which foreign corporations may do business; and also said: "It cannot be said that a corporation which is merely soliciting contracts to begin and continue entirely out of this state is doing business in the state. If it were so, every corporation located outside this state which should insert in a Rhode Island newspaper an advertisement of its business would come equally within the purview of the act."

In *Arrow Lumber & Shingle Co. vs. Union P. R. Co.* (1909) 53 Wash. 629 Pac. 650, it was held that a railroad company neither owning nor operating any railway line within the state, having within the state a representative known and advertised as its "general agent" but who was in fact in the employ of and paid by the initial carriers by whom all freight contracts and tickets were issued and to whom money collected for tickets was remitted, was not doing business within the state so as to subject them to suit there.

Where the local statute providing that any foreign corporation found doing business in the state shall be subject to suit there to the same extent that corporations of the state are by the laws thereof liable to be sued, so far as it relates to any transactions had, in part or in whole, within the state or any cause of action arising there, but not otherwise, defines doing business within the state as "having any transaction with persons or having any transaction concerning any property situated in this state through any agency whatever" a foreign railroad corporation having no lines within the state is not brought within the jurisdiction of the local court by service of process upon a traffic solicitor in a suit upon a cause of action not arising within the state nor out of any transaction had in whole or in part within the state. *Atlantic Coast Line R. Co. vs. Richardson* (1908) 121 *Tenn.* 448, 117 *S. W.* 496. The court said: That these corporations were, in a sense, "doing business" in this state through their traveling soliciting agents, is true; and service upon the latter in all cases falling therein Secs. 1 and 2 of the Act of 1887, which we are considering, would probably bring them into our courts. But the vice in the proposition is found in the facts alleged in the pleas, and shown in the evidence, put the case outside the provisions of the statute, as we have already undertaken to establish. Hence, it is that, as "the cause of action did not arise from "any transaction with persons" or "concerning property situated in this state through any agency whatever acting for this corporation within the state" service on these agents did not give the circuit court jurisdiction of the cause.

### TAXATION

That the earnings of a Common Law Business Trust are not subject to corporation excess profit taxes has been judicially determined by the U. S. Supreme Court, in a decision rendered on the 17th day of March 1919, in the case of *Crocker et al, Trustees, vs. John F. Malley, Collector of Internal Revenue*. This case holds that the total profits are divided pro rata among the shareholders, and each shareholder then becomes individually liable to the government for the percentage due by way of income, as provided by the law regulating taxes upon incomes. To illustrate: A corporation having \$500,000 to divide among its stockholders is required to pay the government approximately 60% or \$300,000 thereof, before declaring a dividend, leaving but \$200,000 for its stockholders, whilst, if a Common Law Business Trust has the same amount for distribution, the whole \$500,000 is divided among the shareholders in the first instance, and the government collects from them such percentage of their individual incomes as has been fixed by the law.

It will also appear to even the layman that the Common Law Business Trust is better grounded and protected by the law as laid down by the many courts of last resort and more secure in the law than the modern statutory corporation; and that the Common Law Business Trust has all the power, rights, safe-guards and advantages and none of the limitations, hindrances and disadvantages of the modern statutory corporations; and that the Common Law Business Trust has stepped in at this most opportune time to take the place of the statutory corporation in the way of a good reliable and substantial business body that has all the advantages of security reliability and usefulness required by the present day business organizations, and that it

surely "fills that long-felt want" in the business world at this particular time.

### A PROFESSIONAL WORD

A recognized authority on corporation law says:

"Well drawn modern Express Trusts avoid no legal obligations, much less do they evade any. If perverted, they should of course, be restrained. They avoid needless business obstacles; they require no arbitrary fixed capitalisation; they can dispense with the deceptive fiction of a par value, a fiction that the New York State Bar Association is reported to have endorsed, 'as a tool of many rascals and the honest servant of no man'; they promote sound administration; they stimulate a mercantile intercourse, and they secure a higher standard of efficiency through active trustees, than is generally attained through the usual perfunctory, often irresponsible, dummy, corporate directors who fail to direct and who when called to account in court are admonished that the high criterion of a trusteeship should be their canon of conduct rather than that of a shifty directorate.

"Express Trustees, regulated by equitable principles and practices furnish some of the highest models for administration. Corporations under the state laws invite and are responsible for the greatest business scandals in our history.

"As for the equitable laws, that regulate trusts and trustees, they are a well formed system which Mr. Justice Story pronounced as even more symmetrical in the United States than the original system in England.

"Neither lawyers nor laymen can ignore experience or truth. It is the substantiality of the trust principle, based upon personal responsibility and efficiency, that has so recommended it over loose, evasive corporation laws found from the Atlantic to the Pacific.

"The Federal Constitution protects trustees as 'citizens' as that word is used in the Constitution. Corporations do not have the privileges and immunities of citizens. Corporations cannot enter another state except upon the terms which that state prescribes. But trustees, under an expressed declaration of trust, as natural persons—are 'citizens' in the fullest sense of the word under the Constitution, and, as natural persons possessed of both state and national citizenship are 'entitled to all privileges and immunities of citizens in the several states.'" (See Federal Constitution, Article 4, Section 2.)

# SELECTION OF EXPERT WITNESSES

(By C. E. McBride, of the Ohio State Bar)

In casting about for some fruitful subject it occurs to me that the subject of the Selection of Experts who testify in cases, whether by the litigants or by the courts, would be a most opportune one.

The trial court should have the power to determine the fact of the possession of the required expert qualification of a particular witness—this absolutely and without review. It has been repeatedly declared that the decision upon the experimental qualifications of witnesses should be left to the determination of the court. Often enough the matter to be testified to is one upon which it would be clearly presumptuous for a person of only ordinary experience to assume to trust his senses, for the purposes of his own action in the ordinary serious affairs of life. Some reliance must be placed upon the intelligence and good faith of the witnesses and the judgment and discrimination of the jurors.

Too often, as for example, in the notorious Thaw trial, conflicting expert witnesses have been called by prosecution and defendant, much to the amusement and disgust of the public. The impression is gaining, whether rightfully or wrongfully, that witnesses can be bought to present expert scientific testimony. Chemists hired by manufacturers have testified to the harmlessness of ingredients, which disinterested scientists have regarded as injurious to the human constitution.

The slightest reflection ought to convince any one that litigants should have no choice in the selection of expert witnesses, but should bow to the authority of the court in the determination of the necessity for calling them, as also in their selection.

The uncertain and contradictory character of expert testimony has weakened its force and effect in the trial of causes. In a New York case Judge Roosevelt said: "An ounce of fact is worth a pound of opinion." The use of experts, in many instances, when called by litigants, has resulted in long-drawn-out trials without any great material assistance to the jury. How to remedy this situation becomes an important question in our legal procedure.

One superior consideration is that court appointments, being more in the public interest, are likely to evoke less biased and more honest, disinterested effort on the part of appointed witnesses. There are serious difficulties to be met with by any other method. There are difficulties in applying any fixed rule for all classes of cases and

all communities. But the plan of appointment of experts by the court seems to receive general support both in professional and in public opinion. This method has been proposed by a number of writers in the various law reviews.

It rests with the court to decide whether for a particular subject of testimony the general or ordinary experience of a layman is sufficient. Litigants frequently are prone to choose expert witnesses and to insist on special accomplishments where justice would be better served by a laxer attitude. A stand must be taken against the undue extension of the topics upon which special experience is required for testifying.

Then, too, there is systematic training directed deliberately to the acquisition of fitness and involving the study of a body of knowledge furnishing a branch of some science or art—termed “Scientific Experience.” No accurate line can be drawn between these two classes, and it should be left to the discretion of the court to choose witnesses from such local lists as are available, just as courts appoint disinterested special Masters or Receivers. The judge decides whether the particular witness is fitted as to the matter in hand.

On many points the nature of the subject is such that a scientific training is indispensable, but rulings requiring it made no general discrimination between the two sources of fitness, experience or training.

In *Kelly vs. Richardson*, 67 Mich, 436, Campbell, Judge, said:

There are branches of business or occupations where some intelligence is required for judgment, but opportunities and habits of observation must be combined with some practical experience. As the scale rises, the qualification becomes nicer and requires greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training.

Evidently the judge should decide on the choice of skill or capacity gained in the ordinary course of life, and that attainable by special, peculiar and out-of-the-ordinary experience and knowledge gained by study and specialization. It thus comes that the rulings of courts applying the requirements of experimental capacity also apply to the choice of witnesses most fitted by experience to testify to the particular facts under judicial determination or jury decision.

The court is so well invested with the discretion in the matter of passing on the competency of witnesses, that it seems to follow that the court should also appoint witnesses qualified as experts. The court can exclude evidence on the ground that it is superfluous and opinionative, because the other facts are already brought sufficiently before the tribunal. Great liberality is shown by courts in passing on wit-

nesses and applying these principles so that the cause of justice may not be obstructed by narrow and technical rulings.

To the modern reluctance of the English Bar to dispute over trifling points of evidence must be attributed the absence of English rulings on this doctrine. In our own country, and in the State of Ohio in particular, narrow, technical objections, though constantly made, are discountenanced and a policy of considerable liberality is enforced.

The court passes, for example, on whether special qualifications are required to pass on blood stains, or a question of sanity, and should also have the option of appointing experts to determine thereupon in these cases. The incompetency of the layman to form an opinion has entered into the grounds of decision of the court to appoint expert witnesses to pass on disputed points.

Historically considered, witnesses are usually appointed by the courts. In France, whenever the court considers that a report by experts is necessary, it is ordered by a judgment clearly setting forth both the object and the necessity of the same. The experts are to be appointed, unless the parties agree upon one only as decided by the court. The necessary documentary and other evidence is laid before them and they make a single report to the court. If the court is not satisfied with the report, new experts may be appointed; the judges are not bound to adopt the opinion of the experts.

In the French Canonical Courts, expert investigations are usually conducted by special experts officially attached to each of the courts. A similar system is found in force in many other countries of Europe; all courts of civil procedure of Holland, Belgium, Italy and the countries where French law has been followed, as Quebec and St. Lucia. In England each side calls its own evidence. Earlier in history, however, the English courts were in the habit of summoning to their assistance, apparently as advisers, persons specially qualified to advise upon any scientific or technical question that required to be determined. Thus in an appeal of mayhem in the reign of Henry the Seventh, a writ was sent to the sheriff to cause to be sent to court a skilled physician of London to testify before the King's Court. Not only was expert assistance called for by judges on Medico-legal cases, but as early as 1554 Justice Sanders applied for aid on a scientific matter.

Witnesses are not compelled to testify unless paid, upon an undertaking by the party calling them, a reasonable remuneration for their services in giving evidence. The evil effect of this is that it is



a fact well known to every practitioner at the bar, and within the judicial knowledge of the courts, that experts on both sides of a cause too often become eager attorneys before the trial is ended and before their testimony is given.

Surrogate Colvin of New York says:

Considerable experience has taught me that the testimony of experts who are selected by the party in whose behalf their testimony is to be given, and where testimony in his favor is assured beforehand, is likely to be considerably influenced by the fact that the experts have been employed as such by the party calling them, and that while on the stand they are paid to have a thory, which they are zealous to maintain; and as a general rule they fall short of that impartiality which characterizes ordinary witnesses in courts; and this observation has led me to scrutinize with great care the testimony given under such circumstances.

While another New York Surrogate said:

The present system of presenting the testimony of experts, in the courts, is poorly calculated to assist in arriving at the exact truth. The expert produced as a witness has almost invariably given assurance that he will swear to an opinion favorable to the party calling him, and for this he usually receives a fee proportioned to his estimate of the value of his opinion to the side for which he testifies.

In the case of Roberts vs. New York Central Railroad Co., 128 N. Y. 455, Peckham, Judge, speaking of expert testimony, said:

Expert evidence, so called, or, in other words, evidence of the mere opinions of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. He (the expert) comes on the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him.

The matter of witness fees in case the court appoints the expert can be determined by the usual practice and standardized. Thus an expert, a physician, a chemist, engineer, hand-writing expert, or the trained testimony of any kind that offers aid, may be paid a fixed sum, regardless of the wealth of litigants, this amount to be collected as part of the costs. Just as a standard sum is paid to jurors, who are thus moved by civic duty rather than the remuneration, even so experts who serve the court will be no less faithful in the discharge of their duty though the fees be small, in fact nominal.

In the trial of cases where plaintiff or defendant is without means to hire the best experts, such appointed experts will be enabled to serve without an undue tax on their resources. The expert loses a little time, but he has served the court and the public who make his prosperity possible.

There is ample warrant in English law for the summoning of expert witnesses by the legal tribunals in various cases. The judge of

a county court may, if he see fit, on application of either party call in as assessor one or more jurors of skill and experience, as also in employer's liability cases, and also in Admiralty matters. In patent cases and in the High Court of Appeals, and in the Judicial Committee of the Privy Council, one or more qualified jurors may be called in to assist in the hearing of a cause in any matter except a criminal proceeding by the Crown.

There is a growing sentiment in favor of the employment of expert witnesses by the court, as is observed in Rogers on Law of Expert Testimony; Lawson on Law of Expert and Opinion Evidence; Foster on Expert Testimony, and other writers along the same lines.

It is said that quite recently a learned judge in New York City advised the jury to put all the expert testimony out of their minds and pay no attention to it. This he did, although a week had been consumed in taking expert testimony, because "an equal number of doctors had testified directly opposite to each other, and all with equal positiveness."

The present system has its strong advocates and no radical change is to be expected in the near future with reference to the method of appointment of expert witnesses. The law allows no excuse for withholding evidence. The expert witness in the performance of his duty as a good citizen should be compelled to testify when his evidence would be helpful to a court or jury, whether his evidence is based on personal observation or some fact connected with the case or upon his accumulated knowledge and experience. Due consideration is given the point that to compel a person to attend as a witness would subject the same person to be called on in every case where his opinion would carry weight, because he is accomplished in a particular science, art or profession.

Authorities conflict, however, on the question whether a person can be compelled to attend and testify as an expert for the fees of an ordinary witness. In that case fees might be made higher for those called in to advise in an expert capacity, which is a matter strictly within the judicial determination, notwithstanding that in England and in many of the States it has been assumed in the negative, either by judicial decision or by statute. However, when the case is before the court and jury it is always for the court to say whether the question calls for expert evidence as well as whether a particular witness is qualified to speak as an expert.

The appointment of the experts by the court would get rid of the confusion and bias of experts selected by the litigants. In the Patrick murder case, Judge O'Brien spoke of the minds of expert witnesses

as "affected by that pride of opinion and that kind of mental fascination with which men are affected when engaged in the pursuit of what they call scientific inquiries."

Pope in his Essay on Criticism says:

Of all the causes which conspire to blind  
Man's erring judgment, and misguide the mind,  
What the weak head with strongest bias rules,  
Is Pride, the never failing vice of fools.

And again in Moral Essays, Epistle one, we have the authority of Pope that:

To observations which ourselves we make,  
We grow more partial for the observer's sake.

If it is not certain that persons called by litigants to testify as experts will always form their opinions under a bias of which they may be unconscious, in favor of the conclusion which they are expected to support, there is ground for apprehending that such, to a greater or less extent, will often and indeed generally be the case; while the fact that the witnesses are men of character and skill may give undue weight to their opinions, and thus add to the danger of such testimony.

In the case of *Shorm vs. Hill*, 26 Fed. Rep., 337, Judge Deady says:

While there is nothing very unusual in an arrangement whereby the compensation of an expert is made contingent in some degree on the success of the party employing him, yet until experts are nominated by the court and paid by the State, the circumstance of their being retained by the parties must always be considered in estimating the value of their services.

This is strong language from a Judge of exceptional ability and long experience and observation on the bench. Men are very apt to believe what they wish, and opinion may be composed of very elastic materials. The Scotch poet, Robert Burns, puts it thus:

But, och! Mankind are unco weak  
An' little to be trusted;  
If self the wavering balance shake,  
It's rarely right adjusted.

The strong bias of interest upon a mind long pondering over, and much excited upon, one subject has doubtless produced genuine convictions of the truth of things to which he testifies.

Dr. Johnson said to Mrs. Thrale: "It is more from carelessness about truth than from intentional lying that there is so much falsehood in the world." Our opinions are much more frequently founded on prejudices, or biased by our feeling than we are aware of.

Experts can be summoned by the court and paid such fees as the court may fix, or may be fixed by statute. Being known as a profession or listed in a particular line of work, the court may make selections and appointments just as jurors are selected. While the non-expert testifies to the subject matter readily mastered by the adjudicat-

ing tribunal, the expert gives conclusions outside that range and gives the results of a process of reasoning which can be obtained only by special study. He can readily be appointed by the court for he is known to be one instructed by experience and to have followed a career of experience, practice and study.

Mr. Lawson in "Expert Evidence," page 210, lays down the rule that one may be qualified as an expert witness by studying without practice or practice without studying. He justly adds that mere observation without either study or practice will be insufficient. In either instance court determines whether the expert is qualified and, by having the appointive power, avoids delays in cross-examining as to competency and in investigations as to his fitness during trials.

As the warrant for the admission of opinions of witnesses in evidence is found in some exceptions to the general and very salutary rule which requires that only facts be stated to the jury, it is the duty of a reviewing court to see that the admission of mere opinion evidence was within some one of the established exceptions to such general rule. Where it does not appear on the whole record but that the jury was equally capable with the witnesses of forming an opinion from the facts stated, it is error to admit in evidence the opinions of witnesses. Such opinions as expressed in *Railroad Co. vs. Schultz*, 43 O. S., 270,, seem clearly to sanction and confirm judges in their power to appoint and pass on witnesses as experts.

Litigants may, and too often do, select incompetent experts. A physician, for example, cannot be permitted to decide upon the credibility of a witness, nor to take into consideration facts known to him and not communicated to the jury. The opinion of a medical witness may rest in part on statements made by his patient. Upon this subject the authorities are in harmony, although there is some difference of opinion as to whether statements of past symptoms may be taken into consideration.

In *McLain vs. Commonwealth*, 99 Pa. 86, two sets of experts held opposite views as to blood stains on a shovel, and persons without any special training testified that in their opinion the stains were caused by human blood. The court remarked that if scientific research gave no aid in such an investigation, it was deplorable, and instructed the jury that they might convict upon the testimony of unlearned witnesses if they were satisfied of the truth.

In effect the court herein appointed the witnesses in the case. Frequently experts are called by litigants, as for instance, touching testamentary capacity, where such experts are needless. The testimony of

experts is entitled to but little weight as against proof of facts and circumstances which show mental and testamentary capacity. Often it is plain that those having a special interest in the subject have so charged their memories with various matters as distinct, independent facts as to be able to present them in their entirety to a jury. If such a witness is found, can he conceal from the jury the impressions which have been made upon his mind? Can it be doubted that his judgment has been influenced by many circumstances which he has not communicated? A witness should not be allowed to give his opinion until he has first shown upon what he bases his opinion, absolutely and without prejudice.

In industrial cases involving facts of science or industrial act, witnesses of trained observation often conflict. The wish is father to the thought and the hired expert is unconsciously a partisan in his reports—even sees things in the light of a theory—deduction of the facts from his inference, so to say—the discredited method of scientific discovery. If you consider the hypothesis of chemistry and electricity, you enter a problematical sphere in which evidence and scientific data can be arranged to suit two or more theories. Much depends on the temper of one's mind as to the interpretation of facts. Psychologically this is known as "apperceptiveness" or groups of thoughts and experiences inherent in the individual and varying according to the apperceptive or experimental elements of other observers.

It is not the eye that sees but the mind, is a maxim of psychology that applies to the matter in question. And hence it is that there should be no obscurational elements of self-interest or sympathy entering into the witness stand where the tried voice of science and truth only should be heard.

In matters such as the determination of sanity, the fact of prejudice is often demonstrated and hired experts often swear in opposition until the trial degenerates into a battle royal between the hired experts; and the proceedings are prolonged to an unusual and unnecessary degree, greatly to the disgust and just criticism of the public. The facts are the same, but the experts see things according to their apperceptive leanings and the size of their fees.

Appointment of these experts by the court would enable an expert to give his indifferent judgment without any bias. A fee based upon the wealth of litigants is not present, and so the opinions of the witness represent the cold facts of the case as he sees them, unmodified by self-interest and pecuniary matters. As much as a half million dollars may be invested in an insanity, testamentary or engineering case by interested litigants to the confusion of justice and the debasing

of public morals. The administration of justice should not be interfered with by bribery and lavish use of money, when a wealthy litigant seeks to avoid punishment or damages.

In an accident case, say on a city railway line, the poor litigant needs the protection of the court and the benefit of scientific appraisal of the injuries done. In such a matter as death by coming in contact with heavily charged electric wire there can be much uncertainty, and experts hired by a corporation are likely to contradict attorneys and witnesses of the litigant. The manner of the burn, extent of injury from shock, are matters to be appraised by experts, true; but experts indifferent to corporations and looking only to the public interest. Such a fine condition of indifference is best secured by giving the court power to select the experts and fix their fees and order it paid out of the same fund the jurors are paid from.

Various plans have been suggested as the proper method of remedying this class of evils. In 1899 Justice Bartlett in an address before the State Medical Association of New York, suggested the following: *First*: "The appointment of a Committee of insanity matters, to examine the person alleged to be insane before trial and make such a report to be read at the trial when all the members of the Commission must attend to be cross examined as either party may desire." *Second*: "The appointment of a like Commission in any case involving a question of medical expert evidence, to report to the court and testify at the instance of either party, without any compensation except a fee to be fixed and paid by the State." *Third*: "The relegation of all matters calling for expert testimony to a commission of experts who shall transmit their determination to the trial court, who must accept it as a fact conclusively established in the case." *Fourth*: "The appointment of expert witnesses who must qualify themselves to give opinion evidence in the case without consultation with the litigants or their counsel, and who shall be compensated for their services out of the county treasury of the county in which the trial takes place."

The New York State Bar Association offered a bill drafted along the above lines, but it was never enacted into a statute. The purpose of creating such a class of witnesses is to give their testimony a higher authority than that of others whom the litigants may call to testify on the same points. Under these circumstances the jury would understand that the judge deemed the experts whom he had appointed peculiarly capable of expressing a correct opinion. The jury would then be morally certain to accept the opinion of such experts in preference to those of non-official witnesses who thought otherwise. Not that this would be a privileged class of expert witnesses, but that the court would have

the power to select experts or a commission from recognized sources of authority.

I think this is the viewpoint that is deemed fair. This will do away with the subsidized expert witnesses. To such a tribunal or body of experts would be transferred the present so called expert evidence. It, at least, would eliminate the opportunity that litigants now have of calling all the experts that money can procure or diligence discover and putting to them hypothetical questions for them to answer, till the crack of doom; and to that is added a long, tedious cross examination which is usually nothing but a battle of wit between the expert and cross examiner. The time occupied in such a performance is one of the things that causes the public to lose faith and confidence in courts and juries, and is bringing the administration of justice into disrepute.

In Michigan in 1905 a statute was passed limiting the number of expert witnesses who may be called by a side to three, and it limits compensation to ordinary witness fees and makes it a criminal offense to pay or receive more. In cases of homicide the court appoints "one or more disinterested persons" to testify as experts to be paid by the county. The Rhode Island Court and Procedure Act of 1905 provides for the appointment on motion of any party of an expert whose fee may be taxed as costs against the losing party, who shall make a report to the court and be thereafter examined at the trial. Neither of these statutes remedies the evil, because they do not do away with experts called by litigants. The remedy is not necessarily the enactment of new statutes, but to find some method by which fake expert testimony may be made impossible to be bought and sold in the public courts.

Judge Endlich at the Pennsylvania State Bar Association meeting in 1891 endeavored to introduce restrictions into the several provinces of expert testimony rather than change the fundamental idea of expert for the purpose of minimizing venality and incompetency. Restrictions are useful for a class which is not actuated by high principle. It is possible to imagine a case of hardship when a desirable expert witness would be excluded because not properly belonging to the strict classification zone, but the scheme should be drastic even though it does occasional injustice.

In both France and Germany the law provides for the appointment by each court of a specific number of permanent experts, whose duty it then becomes to familiarize themselves with the particular learning necessary to qualify them in the particular branch or phase to which they may be called. There is an organized tribunal of experts to which the opinions of expert witnesses can be referred.

A similar system could be readily grafted on our American practice. There would be no difficulty in providing in each county for a County Physician, who, by the tests of an adequate competitive examination, shall show his general and special competency for this particular post.

In addition to the duties devolved upon him of conducting post mortem examinations, and of pursuing any other investigations that may be required in a litigated issue, such a physician might be made the arbiter in those moot questions by which the law has been kept in a state of such distressing incertitude.

Is there such a disease as moral insanity, or as mania transitoria? Can human blood stains be distinguished after having become dried? If a question of this kind arises on the trial of a cause, it would not be inconsistent with the analogies of the law to refer it to an official expert, just the way that a chancellor sends a question of fact to be determined by a master in chancery or by a common law court and jury. But if this be done, it should be done with the checks which attend the chancery system. The official physician who acts as referee must be placed under judicial restraint.

He should owe his appointment to neither party, but to the State, irrespective of any particular case. His duty should be to take testimony, if needed, on the case, and to hear counsel, so that he will be in no danger of hazarding one of those rash and ignorant opinions which have so much disgraced this branch of medical practice. After thus judicially hearing the case, it should be his further duty to judicially certify his opinion to the court by whom the reference is made. In proper cases there might be allowed an appeal from such opinions to a supreme court of governmental experts appointed by the State at large.

It may be said that this may be productive of occasional delay. This is true; but the difficulties thus arising would not be so great as those which almost every contested medical issue now involves and which, in cases of insanity, have led courts so often to grant new trials from sheer despair of drawing a decisive conclusion from the jargon introduced.

Soon, also, the delays of appeals would be reduced; for certain great cardinal questions would be settled beyond dispute. We should soon know whether there is such a thing as moral insanity, and whether it is practicable to distinguish human blood after the expiration of a week from the period of its drying. Settle a few such points as these, and we relieve criminal justice of a large part of the uncertainties by



which it is now beset, and we will have a series of rules by which cases can be intelligently, consistently, and humanely conducted.

Nor will this be all. We will be able to get the judicial utterance of science as to vexed issues of fact, instead of interested arguments of experts who are virtually employed as counsel by party calling them, or the wild utterances of philosophic monomaniacs who are simply called because of their absorption in some unique theory of their special concoction. Such men need not be silenced. Experts as counsel, indeed, will find a proper and important office in presenting the two sides of the issue to the expert who acts as referee. But the expert who fills this last judicial post will be disembarrassed of all personal relations. He will have no client to serve, and no past partisian extravagances to vindicate. He will render his opinion as the advocate neither of another nor of himself. When he speaks he will do so judicially, as the representative of the sense of the special branch of science which the case involves, governed by the opinions of the great body of scientists in this relation, and advised of the most secret investigation.

When this is done, we will have expert evidence rescued from the disrepute into which it has now fallen, and invested with its true rights as the expression of the particular branch of science for which it speaks.

# SOUTHERN STORIES

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## From Sense of Smell

Said a Mobile (Ala.) hotel clerk to a lawyer friend:

"I hear Bill died last night. What was the trouble?"

"Well, you see, he had an alcohol rub and then broke his neck trying to lick it off."

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## QUALIFYING.

"So this applicant for the chief clerks job claims he is a college man?" asked the senior member of a Mobile law firm addressing his junior partner. "Has he anything to back up that claim? Can he qualify?"

The partner stepped to the door and returned.

"The young man says", he reported, "that with your kind permission he will come in and give his college yell."

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## WORRIED OVER INQUIRIES.

A woman, wearing an anxious expression, called at an insurance office one morning in Houston, Texas.

"I understand," she said, "that for \$5 I can insure my house for \$1000."

"Yes," replied the agent, "that is right."

"And," continued the woman, anxiously, "do you make any inquiries as to the origin of the fire?"

"Certainly," was the prompt reply.

"Oh!" and she turned to leave the office, "I thought there was a catch in it somewhere."—

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## NO CLOSED SEASON

A Lake Orion (Michigan) farmer caught a young woman doing a "September Morn" on his property and had her haled before a Justice of the Peace at Oxford.

"What's the charge?" asked his honor.

"Takin' a bath in the spring, your wusship," said the constable.

The aged dispenser of justice, who is also a barber, consulted a dog-eared copy of the statutes and buried himself in its pages for several minutes; then, closing the legal tome and stroking his beard, he said very solemnly: "The charge is dismissed and the miss is discharged. I find that she had jest as much right to take a bath in the spring as in the fall."

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## The Weight of Flattery

A court in Mississippi was once presided over by a rural justice of the peace. "I realize," said the counsel for the defense, "that I stand in the presence of a descendant of the grand old Huguenot family which emigrated from France to escape from religious intolerance. Many able jurists have sprung from that family and embellished the bench and bar of the Union. Their watchwords are honor, truth and justice, and their

names are spoken in every home. The law is so plain in this case that 'he who runs may read.' Shall I insult the intelligence of this court by reiterating a proposition so simple? Need I say more—"

"No," said the judge, "'taint necessary—I'll give you a judgment."

Counsel sat down, while the judge with emphasis knocked the ashes from his cob pipe, and counsel for the plaintiff began:

"May it please the court—"

"Squire, what are you fixin' to do?" asked the judge.

"I have the closing argument," was the reply.

"Well, you jes' as well set down. I done got my mind sot on the other side. Judgment for the defendant."

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#### Out for Business

An old-fashioned revival meeting was being held in a county seat town in Alabama. The speaker was of the "snorting-prancing" kind.

"Who of you want to go to hell? Stand up, those of you who want to go to hell."

Everyone remained seated except a Hebrew, who stood up at the back of the room. The revivalist looked at him for a moment and then shouted:

"Hit the sawdust trail. Come right up here."

The Hebrew advanced to the edge of the platform and the exhorter, looking at him, said:

"Is it possible that you want to go to hell?"

The man answered, "Yes."

"Why do you want to go to hell?"

"Well," said the Hebrew, "everybody says that business is going to hell, and I want to go where the business is."

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#### Slightly Suspicious

A Carolina ducky was lately accused by a farmer of stealing a chicken. "See here, my man," said the employer of the accused, "are you certain that he shot your chicken? Will you swear to it?"

"I won't swear to it," said the farmer, "but I will say he's the man I suspect of doing it."

"That's not enough to convict a man," said the other. "What aroused your suspicions?"

"Well," said the farmer, "I saw him on my property with a gun; then I heard the gun go off; then I saw him putting the chicken into a bag; and it didn't seem sensible, somehow, to think that the bird committed suicide."

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#### A Time Exposure

A judge's little daughter, who had attended her father's court for the first time, was very much interested in the proceedings. After her return home she told her mother.

"Papa made a speech and several other men made speeches to twelve men who sat all together, and then those twelve men were put in a dark room to be developed."

# BANKERS REFUSE TORREN'S TITLES

By William Freeman, LL. B., of the Los Angeles (Cal.) Bar

In California large sums of money are loaned upon real property. It is safe to say that more money has been loaned by bankers with real estate as security than has been invested by any other class of investors.

In making loans upon real estate many things are taken into consideration by the loan committees. Not only is the value of the property given careful consideration, but likewise its location, its productivity, its income, future prospects, and every other consideration which in any way will enlighten the loan committee not only regarding the present security of the loan, but also the probability of the payment of interest installments and principal, and the value of the land to the bank in event they are compelled to take it over in satisfaction of the loan.

Of equal if not first importance to the bank is the question of the title to the property. No matter how large a margin of equity there may be in the property, how certain the interest and principal is to be paid, the loan is in a precarious condition if the title to the property is bad. If the title fails, the loan fails with it. The security is no better than the title of the borrower

If there are other liens and judgments which have attached to the property before the new mortgage is recorded, the bank is not getting the security for which it bargained. There may be discrepancies in the boundaries, overlaps and other matters which go to the very heart of the security. Then again there may be defective quiet title or probate proceedings which render the title of the borrower valueless.

Before the admission of California into the Union we adopted in this State the universal system of evidencing title, known as the recording system. It is a method familiar to every property owner. It is part and parcel of our government. It does not require the use of lawyers or experts to explain its simple provisions.

In 1897 the "Torrens law" was first introduced in California. It was never used in fifty-six counties in the State for seventeen years after its enactment. In San Francisco two or three parcels of property were placed under this system. No further steps were taken to make use of it. In 1914 the law was amended; since that time greater use has been made of the system in three or four counties in the State. In Los Angeles county, where it has been put to more general use, about two per cent of the property in the county has been placed under the system during the past eight years. This small percentage is a weak showing when it is considered that the proponents of the Torrens system put forth every effort to make its use general.

The fair-minded and progressive banker will naturally inquire, "Why should I not loan my depositors' money upon a Torrens certificate as the

sole evidence of title, just as I now loan it upon a certificate or guarantee of title, or policy of title insurance?"

The reasons are very simple, the most important of which are as follows:

The security offered by the Torrens law now totals approximately \$25,000 in the Torrens Assurance Fund, which is to make good losses growing out of property valued at \$25,000,000, which is now under the new system.

Assuming that this fund is adequate to pay a loss, the law requires prolonged litigation before a loss is paid. The party losing the investment by reason of failure of title must pursue the party causing the loss to final judgment, and thereafter sue the State Treasurer, who will be defended by the Attorney General. It is like having one's automobile insured against theft and then being compelled to ferret out the thief and show that he is not financially responsible before placing a claim against the insurance company.

No federal liens are ever shown on Torrens certificates, and there is no machinery provided in the law by which these important liens can be put on the Torrens certificate. A federal lien is binding on all real property within the federal district. In California there are two federal districts. When a federal lien is filed with the District Court clerk at Los Angeles, and San Francisco, it becomes a lien against all real property of the debtor in the State of California. The Los Angeles district includes all of the counties as far north as Fresno; the San Francisco district takes in the remainder of the State.

Recently the United States Treasury Department has ordered filed in California delinquent income tax liens. In Southern California it is said they exceeded 5,000 in number. Some of the tax liens were for sums in excess of \$50,000. No mention of these liens can be made on a Torrens certificate, yet they are as binding upon the real property of the borrower as if they were a mortgage duly recorded. They take priority over other liens.

Mechanics and material men's liens, as everyone knows, attach to property the moment work is begun or material delivered upon the premises. This lien never appears on Torrens certificates until a notice of lien is filed and noted by the Registrar. The law does not require that this be done until a period of thirty-five days after the building has been completed.

Bankruptcy proceedings are never noted on a Torrens certificate. The very property shown on the Torrens certificate may by the operation of the Federal Bankruptcy Act be vested in the Trustee in Bankruptcy. Yet the Torrens certificate may show a clear title in the name of the bankrupt.

Two Torrens certificates may be issued covering the same property—in whole or in part. This happens repeatedly.

After the loan is made, another Torrens certificate may by error be

issued to cover in whole or part the identical property which is security for the loan.

Some courts have held that the Torrens certificate last in date is first in priority—that is, would take precedence over the Torrens certificate on which the loan was made.

Delinquent taxes are not noted on a Torrens certificate until after the property has been sold to the State for failure to pay the taxes.

In a review as short as this, it is impossible to do other than point out a few of the vital defects in a law of this kind. It revolutionizes the system of evidencing title to property. It has resulted in serious confusion. Property owners who first accepted the law as an improvement over the recording system are now repudiating it. The expense to the tax payer for the deficit caused by the smallness of the fees is also causing dissatisfaction.

The property owning public in California have average intelligence. They have shown their distrust of the law by their failure to make use of it.

In Los Angeles county only a few of the smaller bankers make loans solely upon Torrens certificates. None of the leading bankers will accept a Torrens certificate until they have made a further and independent examination of the title or have had the title independently investigated by a responsible title company.

In other words, the conservative and far-sighted banker long ago learned that his loan was no better than the title of the property given as security. He is convinced that a system of title which affords such inadequate financial security and which has so many vital defects, and but partly sets forth the condition of the title, is unsafe and cannot be relied upon when he invests the funds of his depositors.

# NOTICE OF BANKRUPTCY

By F. C. Hackman of the Seattle, Washington, Bar.

(Editor's Note: This is the fourth article of a series written by Mr. Hackman on powers of the federal government touching real property).

By section 8 of Article 1 of the federal constitution plenary authority is conferred upon the Congress "To establish \* \* uniform Laws on the subject of Bankruptcies throughout the United States," and in the exercise thereof to establish the details of the system as it will. *Singer v. National Bed Mfg. Co.*, 65 N. J., Eq. 290, 11 A. B. R., 276; *Six Penny S. B. v. Stuyvesant Bank*, 10 N. B. R., 390, *Fed. Cas.* 12,919; *In re Deckert*, 10 N. B. R., 1, *Fed. Cas.* 3,728. Congress has enacted bankruptcy laws on four different occasions. The first was the act of April 4, 1800, repealed December 19, 1803. The second act was approved August 19, 1841, and repealed March 3, 1843. The third act was approved March 2, 1867, and repealed by act of June 7, 1878, taking effect September 1, 1878. The fourth was enacted July 1, 1898, and, with amendments since made, is the law now in force.

The Bankruptcy Act makes the filing of the petition in bankruptcy effective to bring into the jurisdiction of the court in which it is filed, all the property of the debtor wheresoever situate within the territorial limits of the United States. The filing of a petition operates as a caveat or *lis pendens* to the world, and, with some exceptions, in effect as an attachment and an injunction, and thereafter until the appointment of a trustee, the estate of the bankrupt is regarded as in *custodia legis*, so far in rem is the exclusive jurisdiction of the bankruptcy court. *In re Granite City Bank*, 14 A. B. R., 404, 137 *Fed.* 815; *Mueller v. Nugent*, 7 A. B. R., 224, 184 U. S. 1, 45 L. Ed., 405; *Bailey v. Baker, I. M. Co.*, 35 A. B. R., 814, 239 U. S., 268, 60 L. Ed., 275; *Matter of Continental Coal Corp.*, 38 A. B. R., 168, 238 *Fed.* 113; *State of Missouri v. Angle*, 38 A. B. R., 394, 236 *Fed.*, 644; *In re Dempster*, 22 A. B. R., 751, 172 *Fed.*, 353; *Board of Road Comrs. v. Keil*, 44 A. B. R., 259, 259 *Fed.*, 76.

If the debtor is adjudicated a bankrupt, thereafter, upon the appointment and qualification of the trustee, the title to all non-exempt property of the bankrupt wheresoever situate in the United States, passes to the trustee by operation of law without any conveyance from the bankrupt, and the trustee becomes vested with title thereto as of the date of the adjudication. No other acts are required by law to vest the title of the bankrupt's estate in the trustee. The divestment of title from the bankrupt is by positive law, is constructive legal notice, and is as binding to every intent as actual notice to the individual. No one can

thereafter deal with the property of the bankrupt on any other basis than that the ownership of the bankrupt has ceased, and that the title to his property has vested in the trustee. *In re Arsen*, 26 A. B. R., 684, 188 Fed., 475; *Johnson v. Collier*, 222 U. S., 538, 56 L. Ed., 306; *Hough v. City of North Adams*, 82 N. E., 46; *In re Granite City Bank*, 14 A. B. R., 404, 137 Fed., 818; *Robertson v. Howard*, 229 U. S., 254, 57 L. Ed., 1174; *Hamilton v. Smith*, 36 Mont., 1, 92 Pac., 32, 122 A. S. R., 330.

Since a court of bankruptcy has jurisdiction of the property of a bankrupt, whether it is in or out of the territorial jurisdiction of the court, and whether it is in the state where the court sits, or in any other state or territory of the United States, the element of notice of bankruptcy proceedings is of peculiar interest and importance. If a federal court, for example, in New York has jurisdiction of the bankruptcy of a debtor owning land in California, or any other state, what notice of the proceeding is afforded by the records of the county in the latter state in which any property of the bankrupt is situate? For answer one's attention is generally called to two sections of the bankruptcy act, and he is advised that if either one or both of the records these sections provide for are not found in the county where the land of the bankrupt is situate, then the pendency of the bankruptcy proceeding is not notice.

One section is 21-e which reads as follows:

"A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened."

The other section is 47-c which reads as follows:

"The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings."

Is it true that the instruments referred to in these two sections must be filed or recorded by the trustee in counties where the bankrupt's property is situate in order to make the pendency of a bankruptcy effective as notice?

The present law does not make necessary or require the execution of a conveyance from the bankrupt of his property situate in the United States to his trustee in order to vest title thereto in the latter. The Bankruptcy Act of 1867, on the other hand, provided that as soon as the assignee (equivalent to the trustee under the present law), should be



appointed and qualified, the judge, or, where there was no opposing interest, the register (equivalent to the referee under the present act), should, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, which should relate back to the commencement of the bankruptcy proceedings, and thereupon, by operation of law, the title to all such property and estate, real and personal, should vest in the assignee. And the act further provided that the assignee "shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts." Section 14, Act of 1867.

Considering this provision a court said:

"The recording of the assignment is not to give force or validity to the transfer to the assignee, or for the purpose of constructive notice within the ordinary interpretation of registry acts, but to enable a purchaser under the assignee to have in the proper county a record of his derivative title. It was wise, however, for other reasons. As the county records should contain a complete registry of all instruments on which transfers of titles depend, it was eminently proper for the protection of all concerned that the assignment in bankruptcy should be there—an instrument in writing which though not conforming in the usual particulars with conveyances from one party to another, or even with sheriff's deeds, yet by the paramount law is a complete transfer and conveyance of all the bankrupt's real and equitable interests, with the exceptions named in the act. \* \* \*

"It is to be remarked that the clause directing the assignment to be recorded gives no further effect thereto than that just stated. The assignment itself passes the property with relation back to the commencement of the proceedings, and all subsequent purchasers are affected accordingly, whether they purchased before assignment actually made or afterwards, and consequently the recording of the assignment is not essential to the validity of the transfer, and is not designed to operate as under the registry acts. The purchaser from the bankrupt after adjudication in bankruptcy or commencement of proceedings, although he had no notice thereof, would take no title. The question of notice could not therefore arise. \* \* \* Purchasers under the bankrupt, after the transfer of title to the assignee, bought nothing, because they took only what the bankrupt had, and after proceedings in bankruptcy, the bankrupt had nothing to be taken. The purchase being of what the bankrupt had at the time, and all his interest having passed to the assignee previously, the purchaser acquired no title as against the assignee." *Davis v. Anderson, Fed. Cas. No. 3, 623.*

The federal supreme court said:

"It is entirely true that the Act of Congress prescribing a uniform rule as to bankruptcies, passed in pursuance of an express grant of power in the Constitution of the United States, is the paramount law throughout the territorial jurisdiction of the National Government. It is as truly the law of each State as it is, and because it is, a law of the United States. The assignment in bankruptcy made in one district, so far as its operation is matter of law, operates with the same effect in all districts. And it operates upon the title to the property of the bankrupt wherever it is situate, so as to preserve it, according to the provisions of the Act, for distribution under it, and so that the title shall pass as it requires, without regard to any dealing with it,

which it forbids. Whatever hardships, if any, may follow to private persons who sell or buy it, and attempt to divert it to their own use, falls upon them, as in other cases, where titles fail, even in the hands of innocent, because ignorant purchasers. But they are volunteers, seeking their private interests, and take the chances of all the consequences of their conduct. The maxim to which they are subject is *caveat emptor*." *Connor v. Long*, 104 U. S., 228, 26 L. Ed., 723.

And in *Phillips v. Helmbold*, 26 N. J., Eq., 202, 208, the court said:

"The bankrupt law indeed directs that the assignment be recorded; but it has been repeatedly held that the recording of the assignment is not necessary to the validity of the transfer to the assignee, and is not designed to operate under the registry acts."

But the purpose of requiring the assignment to be recorded was "that every purchaser of land at an assignee's sale may have recourse to a certified copy from such registry, as a link in his chain of title, in any suit he may bring for possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring thereafter. Registration is necessary for the safety of such purchaser, for there is but one original assignment, which is filed in the district court clerk's office. It might be destroyed or lost, and often most inconvenient to have recourse to. Where this law is observed, the loss of the original would work no damage, or work inconvenience to the purchaser or any other claiming under him. for they have recourse to a 'certified copy' from the registry convenient, and which the act declares 'shall be evidence thereof in all courts.'" *In re Neale*, Fed. Cas. No. 10,066.

The provision of the act of 1867 requiring the assignment to the assignee to be recorded, and the decisions thereon, have been here considered, because that provision of that act is analogous to the provisions above quoted of the present law, and the decisions on the former have been considered precedents that have been applied to section 47-c of the latter.

Thus it has been held, as to the present Bankruptcy Act, that on an adjudication in bankruptcy, followed by the appointment and qualification of the trustee, the property of the bankrupt situate anywhere in the United States, or any one of them, passes to such trustee as of the date of adjudication.

"To hold \* \* that the effect of the adjudication on the property of the debtor is confined to the ordinary territorial jurisdiction of the bankruptcy court, would thus be contrary to the express provisions of the statute, and in many cases frustrate what is perhaps the chiefest purpose of the law, to insure the equal distribution of the assets of an insolvent among his creditors.

"Nor is this position in any way affected by the amendment to the bankruptcy act of February 5, 1903, (47-c) \* \* which directs the trustee to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt holds real

estate not exempt from execution, and pay the fee of such filing, etc., etc. This is required for the purpose of giving more general notice as to the status of the property, but more especially with a view of affording more facile proof of title in behalf of local or other purchasers of the estate under the bankruptcy proceedings. But the title \* \* passes by operation of law as of the date of the adjudication, and this provision, as it affects the title, is to be regarded only as directory. Under the bankruptcy act of 1867, the title passed by formal deed from the judge or the register to the assignee, and related back to the filing of the petition, and the assignee was directed by the statute to have such deed recorded in the various registry offices where the realty of the bankrupt was situated, within six months, etc.; and under the decisions construing that statute it was held that the requirement was directory, and that the title was not otherwise affected. \* \*

"In our case and under the present law \* \* the title passes by operation of law as of the date of the adjudication, and under the authorities cited, and for like reason, the requirement of this amendment that the certified copy of the adjudication be filed in the register's office should be held directory only." *Ward v. Hargett*, 151, N. C., 365, 66 S. E., 340. And this view was adhered to in *Hull v. Burr*, 61 Fla., 625, 55 So., 854."

Section 47-c directs the trustee "within thirty days after the adjudication" to file certified copies thereof in every county where the bankrupt's property is situate. It must be observed that the proceeding is pending for some time prior to any possible compliance with this section. And in many cases it is not possible for a trustee to comply with it in the time specified. For example, a trustee is appointed by the creditors of the bankrupt at their first meeting, which the law directs shall be held not less than ten nor more than thirty days after the adjudication, and if by mischance a meeting be not held within such time, then at such date as the court shall fix. Thus there are cases in which no trustee is appointed and qualified within thirty days after the adjudication. Or a trustee may have no knowledge within such time of the existence of certain property, such as that omitted from the schedule. But notwithstanding any of these circumstances, title to the bankrupt's property passes to and vests in his trustee as of the date he was adjudged a bankrupt.

It must also be observed as to 47-c, that the trustee is merely directed to file a certified copy of the decree of adjudication. The Bankruptcy Act does not prescribe that the instrument shall be recorded or indexed, or that when filed it shall operate as constructive notice. It does not specify what shall be the consequences of failure to make the filing. And the mere filing of it does not make it effective as notice. That is the case with respect to some instruments permitted to be filed by the laws of some states which have as their object the preservation of evidence.

There is, so far as most diligent effort can discover, no decision upon section 21-e, above quoted, touching the necessity of a trustee recording the instrument therein referred to. And yet an opinion is quite generally entertained, even by some writers of text-books, that this section is intended to make it the duty of a trustee to record a certified copy of the order approving his bond in all counties wherein any property of the bankrupt is situate in order to effect notice of the bankruptcy of the owner. This view is not correct. Section 21-e is a rule of evidence, just as subdivisions d, f, and g of the same section are also rules of evidence. In an action in a court brought by a trustee, this section makes it unnecessary for him to establish the jurisdiction of the court of bankruptcy appointing him, or the petition on which the proceedings were based, in order to sustain the action, for it is sufficient that he introduce in evidence a certified copy of the order approving his bond. And it is also evidence sufficient to authorize and require all custodians of the bankrupt's property to deliver it to him. *In re Moore*, 104 Fed., 869; *Anderson v. Stayton State Bank*, 82 Ore., 357, 159 Pac. 1033. It is analogous to the provision in section 16, of the Bankruptcy Act of 1867, that "In all suits prosecuted by the assignee, a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue."

Section 21-e is also intended to furnish facile evidence to a purchaser from the trustee of a bankrupt in behalf of his title. A certified copy of the order approving the trustee's bond, being conclusive evidence of his title under the provisions of that section, and the record of it imparting the same notice that a deed from the bankrupt to the trustee, if recorded, would impart, it operates under the Bankruptcy Act as a link in the chain of title through or under which a purchaser from the trustee must necessarily claim. By recording it (waiving the question of right to have it recorded) the purchaser can show conclusive record evidence that the trustee was vested with title to the premises, and, therefore, successor by operation of law to the interest of the record owner, the bankrupt. Thereby is established a record chain of title from the bankrupt record owner to the trustee, and from him to the purchaser under the trustee's deed to him. The certified copy of the decree of adjudication directed by 47-c, to be filed, cannot effect the purpose 21-e is intended to accomplish in this respect.

Section 21-e merely defines what a certified copy of the order approving the trustee's bond shall be evidence of and the degree of that evidence. It "shall constitute conclusive evidence" that the trustee is vested with title to the bankrupt's property, and "if recorded" shall impart the same notice that a deed from the bankrupt to the trustee would,

if recorded, impart. It does not provide that the certified copy of the order approving the trustee's bond must or shall be recorded. It merely declares what it shall be evidence of "if" recorded.

Contrary, therefore, to general belief and to the statements in various treatises and text-books, it is apparent that the Bankruptcy Act does not make it mandatory that a trustee in bankruptcy file or record the instruments referred to in 21-e or 47-c in order to effect constructive record notice of the pendency of the bankruptcy proceedings. And there is no other provision for that purpose. As has been repeatedly decided by courts, a petition in bankruptcy is itself a *lis pendens* or *caveat* to the whole world. That all the world has notice of a transfer by operation of law in proceedings in bankruptcy is a mere fiction—not true in reality. Yet, as stated hereinbefore, the divestment of a bankrupt's title is by positive law, of which the world must take notice. It is constructive legal notice, and is binding to every intent as actual notice to the individual. *Mays v. Manufacturers' Nat. Bank*, 64 Pa. St., 74, 3 A. R., 573.

It must be borne in mind that, as hereinabove stated, Congress has plenary power in the matter of bankruptcy and can fix the details of the system in such manner as it will, and, therefore, no state has any power to require some notice of a bankruptcy to be filed or recorded that Congress does not authorize.

The bankruptcy of a property owner affects his competency to deal with his property, just as other matters do which are not necessarily disclosed by records. As one is put upon inquiry to ascertain whether an owner residing in distant parts acting through his attorney in fact is living and his competency; or to ascertain the marital status, age, sanity, etc., of a person, or the authority of officers of a corporation, with whom he proposes to deal, which are not usually record matters, so he is put upon inquiry with respect to the solvency of that person or corporation. The hardship of inquiry is alike as to all such matters.

# TITLE AND ABSTRACT DEPARTMENT

Frank C. Hackman, Editor in Charge

## THE MONTANA ABTRACTER'S BONDING LAW.

In Montana, it is by statute, made a misdemeanor to engage in the business of making or compiling abstracts of title to real estate "for compensation or hire," without first filing with the State Treasurer a bond in the sum of \$5,000.00, running to the State of Montana, with sureties approved by the judge of the District Court; the sureties to be two in number if personal sureties. The bond to be for the "use of any person aggrieved," and conditioned for the faithful performance of duty by such abstractor, "and the payment of any and all damages that any person may suffer by reason of any error, deficiency or mistake in any abstract or certificate of title, or any continuation thereof, made or issued by such abstractor."

Upon furnishing such bond the abstractor is entitled to receive from the State Treasurer a certificate to do business, valid so long as the bond is unimpaired.

Section 3 of the act provides: "The compensation to be charged and received by abstractors of title shall be and remain a matter of contract between the parties."

Section 4: "Any abstract of title to real estate, certified to be true and correct by any abstractor holding a valid and subsisting certificate of authority from the State Treasurer, as herein provided, shall be received by the courts of this state as prima facie evidence of its contents, under such rules and regulations as to procedure as such courts may promulgate."

The bond is made effective for one year, and must be renewed annually. The Attorney-General may, on complaint of "any reputable citizen", require an abstractor, on ten days' written notice, to furnish a "new or additional bond," or to show cause before the State Treasurer for non-compliance. If within the ten days new or additional bond is not filed, and no sufficient reason shown therefore, the State Treasurer shall make written annulment of the abstractor's certificate of authority. It is made the duty of the Attorney-General to represent the complainant in such cases, and the right of appeal is given either the complainant or abstractor to the "District Court of the county in which the complainant resides."

An abstractor qualifying under the act "shall procure a seal," with the name and location of the abstractor stamped thereon, an impression of which must be deposited with the State Treasurer before a certificate shall issue, and the "seal shall be fixed to every abstract, or certificate of title issued by such abstractor."

A violation of any of the provisions of the act is declared to be a misdemeanor punishable by a fine of not more than \$500.00 for each offense. (Laws of Montana, 1915, c. 43, p. 62.)

There are eight states, including Montana, wherein abstractors of land title are subject to statutory provisions requiring bonds to be given and

other conditions complied with. Some also fix the abstractor's compensation, and confer certain rights. In certain respects the Montana law is similar, and in other respects unlike, the laws in the other seven states. In two states the bond required is proportioned in amount to the population of the county where the abstractor (individual, firm or corporation) is to conduct the business. In the seven states the required bond must be approved by and filed with designated county officials of the county wherein the abstractor proposes to do business. It is apparent, therefore, that in these states an abstractor must furnish a bond in each county where he may wish to operate a business. Differing in these two particulars the Montana law requires the bond to be approved by a district judge and filed with the State Treasurer, and the amount is a fixed sum without relation to population of the various counties, or to the varying average among the counties of the state of the value of land units or parcels. It seems that, under the Montana law, an abstractor, by filing the one bond, is entitled to conduct an abstract business in any county, and in as many counties, as he may elect. As will be observed, the law in Montana imposes no qualification of a personal character, such as that of knowledge or skill; or of an impersonal character, such as the possession of a "plant" or tract indexes, or other equipment, as essential in order to engage in the business. However, personal qualifications are not imposed by any law anywhere; but in at least two states the possession of tract indexes are made necessary. The Montana law, therefore, like similar laws elsewhere, puts all abstractors upon an equality. An abstractor who has invested capital in a modern plant, and who is thereby charged with the expense of its maintenance, is on equality with an abstractor who has no plant whatever, but searches the records with such aid as the official indexes may afford.

In Montana, as in other states where abstractor's bonding laws are in effect, the statute abrogates the common law rule making privity of contract essential to support an action for damages, by making the abstractor liable upon his bond to any person aggrieved by reason of any error, deficiency or mistake in any abstract made by him. And this right of action has been sustained in various jurisdictions under similar laws. Though imposing a liability upon an abstractor not existing at common law, it is a liability that is a distinct advantage to those who deal in land in reliance upon abstracts in that it gives them a sense of security not otherwise afforded in all cases; and it cannot be fairly denied that this is also a business benefit to the abstractors themselves. It imparts an added value to their abstracts.

Section 3 of the act above quoted is wholly unnecessary and useless. Modern legislative acts too frequently have provisions of that character. The section but affirms what is and what would be the law, if that section were not in the act, namely, that an abstractor's compensation is a matter of private contract in the absence of an express statutory declaration to the contrary.

Section 4 makes an abstract, certified to be true and correct by an abstractor "holding a valid and subsisting certificate of authority," prima facie evidence of its contents. This is not so at common law, and this section, therefore, give a value to an abstract it would not otherwise have. Manifestly under the terms of this section an abstract, in order to be prima facie

evidence, must be one made by an abstracter actually engaged in and authorized to do business. An old abstract made by one who has gone out of business could not be said to be made by one "holding a valid and subsisting certificate of authority." It was the legislative intent that in giving the effect of prima facie evidence to an abstract, there should be surety by way of the required bond for indemnification of any one damaged through such use of it, as well as in respect of any other use.

The Montana act, like other similar acts, provides that an abstracter may be required to furnish a new or additional bond; but it is unlike the other acts in that the initiative in such matters is left to "any reputable citizen." The attorney-general is required to represent such person, but not to take original action—be the complainant—by reason of his official capacity. It seems reasonable to infer that this section of the law would make it possible for one who has been damaged in an amount in excess of the statutory bond, through some error in an abstract, to proceed to compel the abstracter to furnish an "additional bond." A peculiar feature of this act in connection with this matter, is that the appeal from the decision of the state treasurer before whom the hearing on the matter of a "new or additional bond" is originally had, may be taken to the District Court of the county where "the complainant resides." It makes it necessary for an abstracter in such cases, doing business in a county in one section of the state, to appear as a summoned defendant and defend himself in the court sitting in the county where the complainant resides, which county may be in a section of the state distant from that where the abstracter resides and conducts his business. An action of this kind is manifestly strictly in personem, not at all in rem, and it is remarkable to make jurisdiction in such cases dependent upon the residence of the plaintiff instead of being determined by that of the defendant. Much could be said upon this matter, and it may be touched upon in a subsequent issue of the *LAWYER AND BANKER*.

If a bonding law has any merit, is of any value, in respect of the abstract business, it is certainly essential that the sureties be responsible parties subject to the jurisdiction of the courts of the state. Requiring periodic renewal of a bond usually has this end in view; but that the renewal be made yearly fixes too short a period. In four states where bonds are required renewal is made necessary every five years, and in other states no specific period is prescribed, but left to the discretion of officials charged therewith. The matter of continuing liability under the bond will be discussed in the next issue of this magazine.

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## TITLE INSURANCE LOSSES

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The question is asked, What losses are sustained by title insurance companies? The most comprehensive and reliable investigation and report on that matter that has come to our attention was made by the Northwestern Title Insurance Company of Spokane, Washington, acting through its indefatigable President, W. H. Winfree. The report bearing date of November 20, 1920, is verbatim as follows:



"Sixty-three title companies answered our request for ratio of losses to insurance written. Four of these did only an abstract business; ten certified to the title according to the records; four gave no information; sixteen gave no figures from which a calculation could be made; six gave the percentage of their losses to premiums received, and twenty-four gave ratio of losses to insurance written.

"Many seemed to hesitate to give the information, others asked us to regard their statements as confidential. In some cases we could not ascertain whether attorneys' fees and court costs were calculated in losses.

"A careful survey of all the answers led us to conclude that the information now at hand was not sufficient to enable an actuary to make any calculation, and that we would not be able, with the expenditure of a reasonable amount of time and effort, to get sufficient data to make a calculation dependable. But the information is nevertheless very interesting and to us quite valuable.

"The reports of percentages of losses to premiums were one-half of one per cent, one per cent, one and seven-tenths per cent, two per cent, one and one-half per cent, and five and one-half per cent.

"The lowest ratio of losses to insurance written was four cents on each thousand of insurance; the great majority showed losses between 8 cents and 20 cents for each thousand of insurance written. Where the losses exceeded 15 cents the volume of business done was, with one exception, quite small. The average loss of the twenty-four companies reporting amount written and amount of losses is 12.1 cents per thousand; eliminating from the calculation those companies which have written a billion dollars or more of insurance, the average loss is 10.6 cents per thousand, showing a remarkable similarity in the experience of both large and small companies. These figures are calculated upon the totals of amounts written and losses; that is the averages are based upon amounts written, and not upon the number of companies. The average experience of the companies, making no allowance for amounts written, is 12.8 cents.

"The comments of the companies were notable in uniformity of statement. The losses were as a rule occasioned by errors of employees in omitting taxes, judgments, etc. One large company stated that they had never suffered a loss on a title from passing a question which was seen and considered."

In a recent address Mr. Cyril H. Burdett, Vice-President of New York Title and Mortgage Company, said as to losses in title insurance:

"I believe that the general policies pursued by title insurance companies since the beginning of the business, by the New York and Philadelphia companies, in the late eighties, have changed very little. Their attitude has been to insure titles which are believed to be good, and to refuse to insure those which are felt to be doubtful. I mean by this that where a question arises and no precedent in a reported case can be found, and the legal officers are uncertain which way the court would decide upon the facts if presented to it, the policy of the companies has been to refuse to approve the title as insurable, although as a matter of insurable risk there would be little danger of the company suffering a loss. The criticism is frequently made that title companies insure only good titles, and it is maintained that such titles do not need to be insured, the owner, purchaser or mortgagee needing insurance only where the validity of the title is doubtful.

"One of the title companies, some time ago, advertised that, for an extra fee, it would insure such titles as were doubtful, but the question arose as to who should be the judge of the doubtfulness, and it was so frequently accused of finding an unusual number of doubtful titles, for the purpose of obtaining the increased fee, that it soon abandoned the plan.

"Under our present system the losses of the companies are very small. An investigation, conducted about two years ago, by a large title insurance company in the West, demonstrated this fact. It was found that one company, with approximately \$33,000,000 of insurance outstanding, extending over a period of eight years, had paid in losses only \$2,711.07. Other companies reported losses averaging from one-half of one per cent to five and one-half per cent of premiums received. This would mean, where the income of a company for premiums—which I shall assume includes the fees for title examination as well—amounted to \$1,000,000, a loss of from \$10,000 to \$55,000 a year. I believe that the higher figure very seldom occurs, and that the average losses paid by our title companies, in the larger cities, would be nearer \$25,000 on a million dollars income. Of course, we all know that the reason why our losses are so small is not because we find the titles perfect, but because we try to make them perfect before we insure them, and this supervision and direction of the means by which titles brought before us are made insurable is one of the most troublesome features of our business.

"It is interesting to compare our losses with those paid by fire insurance companies, which average about 50 per cent of the premiums received, with expenses of about 35 per cent. Our expenses average from 50 per cent to 85 per cent.

"The most frequent losses which title companies have to meet arise where policies insure marketability of title, and those of us who are familiar with the business in large cities, especially where there is more than one title company, find the greatest trouble arises from the questioning of titles upon re-examination by one or the other of our competitors, or by the regular practitioner, resulting sometimes in considerable expenditures in order to remove doubts as to the validity of title. It is very seldom that any title company has a direct attack upon the title to the premises insured. The experience of all of us, I think, will show that our most frequent losses, although not necessarily the largest losses, arise by reason of oversights and omissions in our own offices. \* \* \*

"In the case of no other class of insurance is the cost of examination of the risk so large as in connection with the insurance of real estate titles, and this cost usually leaves a comparatively small margin of the fees to be apportioned as a reserve for the payment of losses. The officers of title insurance companies, therefore, are usually more or less perturbed when confronted with the necessity of meeting a loss. While I would not advocate a policy of recklessness in the passing of titles, I do believe that title companies can go farther than they are now doing in the assumption of risks, with little, if any, danger of having to pay very much increased losses. \* \* \*

"I have testimony from a very keen observer in the title insurance business, borne out by my own experiences, that after the lapse of ten years the chance of loss on a title insurance policy is almost nil. The hazard is greatest in the first year or so of the life of the policy, and the probability of loss gradually lessens from that time on." (Address at Penn. Title Assn. Conv., May 23 ult.)

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## NATIONAL TITLE INSURANCE

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With few exceptions title insurance companies have confined their operations to the insurance of titles to land situate in the respective counties wherein they have their head offices. In other words, the business of insuring titles has been conducted as a local rather than as a national business, therein widely differing

from fire, surety, indemnity and other kinds of insurance businesses. But that it will continue to possess a local character is quite unlikely; expansion appears not only possible, but also probable. Conditions and forces in the business world, over which the title companies themselves have no control, may impel them to expand the scope of their operations whether or not they wish to do so. Cyril H. Burdett, Vice-President of New York Title and Mortgage Company has given this subject much consideration, and a recent address thereon made by him affords valuable information. After speaking of several matters of policy of title companies which occasion those dealing with them some dissatisfaction, he said:

"Another symptom of this impatience on the part of the public, with methods employed by the title companies, was manifested about five years ago, in the action of the Federal Farm Loan Bureau, when they called upon title companies to furnish policies based upon examinations by local attorneys covering only the period for which the statute of limitations had not run in each state. I secured a conference with members of the Farm Loan Bureau and protested against this seeming revolution in title insurance methods—the examination involved in some states going back a very short period; for instance, in Kentucky, for only eight years; but the members of the board were inexorable. They said: 'If the examination for this period discloses the title to be good, no insurance is necessary. All we require is a guaranty, without examination, for the period prior thereto, thereby saving both time and expense.' They insisted that insurance is taking a risk, and that the compensation paid to title companies is simply for the risk involved in insuring for the period where no examination is made. This seemed plausible to the surety companies, so they are writing this title insurance in the nature of a blanket bond, in four out of the twelve land bank districts into which the country is divided, for the federal land banks of Baltimore, Columbia, Louisville and New Orleans. The surety companies guarantee, without examination, that all titles certified by the attorneys selected by the district land banks are good and valid, and that the mortgages made to the land banks are first liens. The Maryland and New York surety companies were able to obtain this right to issue such policies only by an amendment to the laws of the state of New York. Inasmuch as no surety company organized under the laws of the state of New York was allowed to write title insurance policies, no surety company organized under the laws of any other state could write title policies anywhere and still do a surety business in New York. Consequently, in 1918, notwithstanding the opposition of the title insurance companies, the surety companies, with the aid of the then superintendent of insurance, were able to obtain an amendment to our laws under the guise of expediting the making of loans to the farmers incident to the raising of increased crops, and thus helping to carry on the war, the amendment allowing them to issue only this particular kind of bond, insuring titles to federal land banks. I have been interested to ascertain just how this plan has been working, and recently made inquiry of the Farm Loan Bureau. They write: 'The plan of insurance against loss on account of title worked out by several of the federal land banks has proven satisfactory in every particular to date. No losses have been reported to us by reason of defect in title, although we were advised some time since by the Federal Land Bank of Columbia, S. C., that they had a case in which it seemed probable they would have to present a claim.' As title companies, we fought this procedure as revolutionary, and fraught with

serious consequences, but the result would seem to prove that it was not so great a danger after all; and it may be that we could branch out, not perhaps in this particular direction, but in others seemingly as radical, without incurring any great losses.

"It is hard to overcome our natural conservatism, but we should not keep on doing business in the same old ruts. This departure by the federal land bank is most instructive. There are other ways of carrying on our business than those we are now following, and we can be more liberal in our methods than we have heretofore been.

"On the other hand, there is some justification for the attitude taken by the title companies in refusing this business. The mere lapse of time is not the only factor entering into the running of the statute of limitations.

"As I have stated before, the surety companies have already encroached upon the field of the title companies by obtaining the privilege of issuing title insurance policies to the Federal Farm Loan banks. I find that this power to act as surety, given to the Pennsylvania title companies, although at first generally availed of, is gradually being abandoned, the Philadelphia companies particularly having almost entirely discontinued this kind of business, the reason given being that they dislike the large outstanding liability by reason of said bonds and prefer to specialize in the fiduciary rather than the surety branch of their business.

"A Maryland surety company is now attempting to encroach further upon the field of the title insurance company by setting up the specious claim that under the power given them by law to guarantee the performance of contracts, they can guarantee payment of mortgages, as such mortgages are given to secure bonds, which they can guarantee, and they have recently asked for a ruling by the Attorney General of New York upholding them in this contention. They, of course, are being opposed by the New York title insurance companies.

"A title insurance company is organized primarily for the insuring of titles and it should not engage in other than a related business. While I oppose the surety companies trying to obtain power to guarantee titles or the payment of mortgages, I would also oppose, in the state of New York at least, the entry by title companies into the surety business. My own feeling is that title companies should only insure titles and guarantee payment of mortgages, and carry on such other business as is related to this main business and necessary to the proper accommodation of their customers in connection with real estate transactions.

"The broadening policy which I especially advocate, therefore, is not along the line of extending the functions of title insurance companies. They already have sufficient powers. I believe that in your state you have too many if you use your surety powers. I believe that you should have power to insure titles, guarantee payment of the principal and interest of mortgages on real estate, act as trustee, and receive deposits. These two last named functions give to the company the opportunity to accommodate its clientele, attracted to it in the course of their main business. The guaranteeing of mortgages is desirable by reason of the fact that the large capital which the companies have must be invested, and the mortgages in turn sold, so that the money can be used again in making loans to clients who are buying and improving real estate. All these transactions involve the examination of titles, a highly specialized work which a title insurance company is best qualified to do. The stockholders, as well as the policyholders, of the title insurance companies have a right to require that their companies shall not engage in a business whose risks are foreign to the business of insuring titles. We have companies created for these other purposes and they, in the same way, should confine themselves to their legitimate functions.

"The development of title insurance business, as I have so far shown, is the liberalizing of policy. At the present time most, if not all, of the

title insurance companies confine their insurance to their local city. In some few instances they extend their operations to the boundaries of the state, where they can send their own employees to make examinations. They never go out of their state, and never insure the examination by attorneys not in their regular employment. I believe the time has now come when the title insurance companies situated in our large cities and having large capital should extend their field of action by giving the benefit of the protection of their capital to the insuring of titles throughout the country, just as fire and life insurance companies and surety companies, organized and located in New York, Chicago, Philadelphia and other cities, issue policies anywhere in the United States. All these classes of companies have outgrown the provincialism which would confine their operations to a single state. Title companies can do the same.

"The issuing of policies throughout the country may be called National Title Insurance, and a title company of one state can insure titles to property in another state without any question as to the legality of such action, if the policies are written in the home state and no agent is appointed for the soliciting of business and writing of policies in the other states. If, however, it is desired to carry on the business in a more extensive manner, by advertising the service and appointing agents for carrying on the work, it will be necessary for the company to meet the requirements of the laws in the foreign states where they wish to do business. The leading cases in the United States courts, which give to insurance corporations the right to go into any state to write policies, are *Allgeyer vs. Louisiana*, 165 U. S., 578, and *Hooper vs. California*, 155 U. S., 648, in which the court holds that the policy being applied for by the resident of a foreign state to the home office of the insurance company, paid for at the home office of the insurance company and delivered by the mails from that office, the business is actually carried on in the home state and not in the state where the applicant resides and the premises are situated. The postal and express carriers are the agents of the applicants, and therefore the business is done at the home office of the insurance company.

"A large amount of business could be done by agents along these lines, and as a matter of fact is now being done by one of the large Eastern companies and one of the large middle Western companies.

"This method of carrying on the business of national title insurance, however, is only preliminary to a larger method of carrying on such business by the organizing of agencies in every one of the states where the same are permitted by the state laws, and advertising the advantages of insurance of titles in general and the facilities offered by the advertising company. Out of thirty-five states where investigation has been made, I find that a title insurance company may enter and appoint agents in seventeen, the provisions with reference to qualifying being either nominal or requiring the payment of small fees, and in some cases the imposition of a small tax upon the fees collected. In sixteen states deposits of securities are required to be made, either in the state where the business is to be carried on or in the state where the home office is located, in most cases \$100,000. This is the same method adopted for the qualification of surety companies doing business in such states. The law of the state of New York was changed last year so as to allow title insurance companies organized under the law of that state to deposit securities for the protection of their policyholders with the superintendent of insurance, where the laws of other states made it a condition precedent to doing business in those states that such securities should be so deposited. The only states found where the laws do not allow outside title insurance companies to do business are the states of Ohio and Iowa. The laws of the state of Ohio make provision for domestic title insurance companies, however, but there are no laws in the state of Iowa providing for the

organization of title insurance companies or the admission of such companies from other states.

"A very determined effort was made at the last session of the Iowa Legislature to pass such laws. Some of the farmers very strongly opposed this action on the ground that the title insurance agents calling upon them to solicit business would interrupt plowing and harvesting, just as book and life insurance agents now annoy them. Providing for title insurance companies, in their mind, only added one more source of annoyance.

"There is no question but that the adoption of national title insurance is spreading rapidly, and wherever the idea is suggested it meets with almost immediate approval by those familiar with title conditions in the various states. I have observed that those acquainted with title company methods are somewhat disturbed over the use of local attorneys to examine and certify titles. They believe that the title insurance companies are running an unusual and dangerous risk in depending upon such certifications by attorneys so far removed from the home office, who are unfamiliar with title company methods and the risks which they are willing to insure against, and whose ability and carefulness are unknown to the insurance company. This objection, however, would apply to the methods in use by fire and life insurance companies, and the answer is that the title company should make investigation as to the attorneys, their personal character and ability, particularly their knowledge of real estate law and their standing in the community; as to whether their work is generally acceptable to the investing institutions in their locality and their experience in connection with the examination of titles and losses incurred through titles which they have passed. All of these matters are capable of ascertainment, and no more risk is involved in accepting the work of properly selected attorneys and agents in other states than is assumed by large surety, life and fire insurance companies in conducting their business in similar manner.

"Hundreds of millions of dollars are invested by the large life insurance companies in making loans in the various states upon approval as to the value of the security by local agents, and approval of title by local attorneys, whose services have invariably been found by these companies to be satisfactory. In our work we will be using this same material, and, without question, with the same result.

"To sum up, therefore, title insurance companies can now write title insurance in every state of the United States by the method of writing their policies and receiving the money therefor at their home office. They can enter into every state, appoint agents and do business in those states by complying with the laws of said states, in most cases in a manner which will not be unduly burdensome.

"It requires only a general education on the part of the public at large as to the value of title insurance. In order to convince the public as to that value we shall have to broaden our methods, make the policy more inclusive, assume greater risks than we have heretofore taken, and convince the public that we are giving value for value. When the time comes that National Title Insurance is a department of every title insurance company, those companies in the larger states having very large capital will of course be able to inspire greater confidence and obtain a larger share of business. The companies in such cities as New York, Philadelphia, Pittsburgh, Chicago and Kansas City, with their large and abundant capital, should be the pioneers in this departure. Until the insurance companies have expanded their activities to include this field they will not have fulfilled their true mission, nor have realized their greatest possibilities."

HISTORY OF DONATION ACTS

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Owing to difficulties with Indians, August 4, 1842, Congress passed "An act for the armed occupation and settlement of the unsettled part of the peninsula of East Florida." The act provided that any person being the head of a family, or a single man over eighteen years of age, able to bear arms, who had made or should, within one year from and after the passage of the act, make an actual settlement within a specified portion of the peninsula, should be entitled to one-quarter section of land. The whole area subject to this donation was limited to 200,000 acres of land. This was the first of the donation acts to induce settlements on the public domain in dangerous or distant parts of the nation.

The next donation act was passed September 27, 1850, for the purpose of inducing settlements in the then Oregon Territory. It provided for two classes of settlers. To the first class of actual settlers who were such prior to September 1, 1850, a donation of 320 acres to those who were single, and 640 acres to those who were married, one-half to the husband, and one-half to the wife in her own right. To the second class, who were or should become settlers between the 1st of December, 1850, and the 1st of December, 1853, it granted 160 acres to a single man, and 320 acres to married persons, one-half to the husband and one-half to the wife in her own right. The first class of beneficiaries embraced white settlers or occupants, including American half-breed Indians, above the age of eighteen years, who were citizens of the United States residing in that territory, and those who were not citizens who should make their declaration of intention to become such on or before December 1st, 1851. The second class embraced white male citizens of the United States over twenty-one years old, or persons who had made a declaration of intention to become citizens, who should emigrate and settle in that territory between December 1st, 1850, and December 1st, 1853. By act of February 14, 1853, this time was extended to December 1st, 1855. Emigrants marrying within one year after arrival in the territory, or within one year after becoming twenty-one years of age, were entitled to the same donation granted married men. To secure a patent residence and cultivation of the land for four consecutive years was necessary. The act of February 14, 1853 provided that, in lieu of the foregoing requirement as to residence and cultivation, claimants should be permitted after two continuous years' residence and cultivation to pay for their lands at the rate of \$1.25 per acre, and by subsequent act the time was

reduced to one year. This donation act expired by limitation December 1, 1855.

July 22, 1854, Congress passed an "Act to establish the offices of surveyors-general of New Mexico, Kansas and Nebraska," and in the second section authorized a grant of 160 acres of land to every white male citizen of the United States, or who had declared his intention to become such, over twenty-one years of age, who was residing in the territory of New Mexico prior to January 1, 1853, and at date of passage of the act, or who removed or should remove to that territory between January 1, 1853 and January 1, 1858. Actual settlement and cultivation for four years were made conditions to a grant under this act, but a settler, if he desired, could purchase at \$1.25 per acre.

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### TITLE INSURANCE PIONEERING

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Abstracts are of such universal use in the United States that a company embarking in the business of insuring titles is at once confronted by the fact its prospective clients have abstracts, are accustomed to use them, and that they constitute a competitive element. How one company met this situation it frankly relates as follows:

"Many, if not most, title insurance companies make a flat charge for a title policy based on the amount of liability. In adopting a schedule of prices we were faced with the fact that there was an abstract outstanding for almost every lot or tract of land in Spokane county, made by an abstractor whose plant had been bought by, or consolidated in, our company, and to say to a holder of such an abstract that it was worthless, or not so good as something else we now had for sale, would entitle him to ask us how soon would it be before we would adopt a new method of evidencing titles and discard title policies. Further, the history of some of our titles require considerably more than one hundred pages of abstracting, while others but a few pages. Is it right to require the man who owns a lot with only a half dozen instruments in his chain of title to pay the same for examining and insuring such title as we would charge the man whose title had passed through much litigation and many owners? We adopted the plan of accepting abstracts in exchange for title policies and making the charge for a title policy based on the cost of continuation of the abstract plus a reasonable sum for examination and liability; and, where a customer had no abstract, we still based our charge in some measure on the cost of compiling the history of the title.

"After a title has once been insured we issue a renewal policy, where there has been no change in title, for the same charge we would make for the continuation of an abstract. Where there has been a change in title, we charge for renewal, abstracting rates plus a smaller sum for liability charge than is charged for liability on an original issue. In all cases where a renewal policy is issued it is just as complete as is the policy when originally issued. On a renewal we require, where renewal charges are allowed, that the old policy be turned in for cancellation, or, if lost, require a small sum in addition to the renewal charge and take a lost policy receipt and waiver from everyone insured in the original policy.



"We would like to emphasize the statement that we accept an abstract of title on the title which we are asked to insure in exchange, or rather as part payment, for a title policy. This course has done more to popularize title insurance in Spokane county than anything else we have done. When the exchange is made we use the abstract for our examination of the title to the date of the last continuation thereof, and we do not check the work of any part thereof which was compiled by a company which we regard as fully competent. The abstract is not continued, but remains in the condition it was when left with us. Any instruments and proceedings affecting the title subsequent to the last continuation of the abstract are taken off in the usual manner.

"When the order is completed the abstract is filed under the same number as that of the order on which the title policy is issued, and at any time those insured in the title policy may, by the surrender of such policy, have the abstract returned in the condition it was when delivered to us. In the earlier stages of our title insurance campaign, whenever a purchaser from, or mortgagee of, one who held one of our title policies refused to accept such policy, we cancelled the title policy and continued the abstract of title down to the date of the title policy, without charge to our customer. We are putting on a new product and felt that in popularizing it we should do nothing which would make one have a feeling that he had been penalized by accepting that product.

"This plan as a whole made the customers of title insurance feel that we were recognizing and giving credit for what they had already spent on abstracts, that if anyone with whom they were dealing refused to accept the policy they could, without additional cost, get their abstracts of title continued to the date of the title policy. We made but one condition to the cancellation of the policy and delivering of the abstract continued to the date of the policy, viz: That we be allowed to discuss title insurance with the prospective purchaser or mortgagee. This gave us an opportunity to explain to such person that an abstract of title was but a history of the record title and that each title policy was based on a history of such title, which history was examined by our expert title attorneys, and that there was represented in a title policy the history of the title, the opinion of expert title attorneys on this history, and a contract of the company insuring the work of the compiler of the history, of the attorneys' opinion, and in addition insurance against forgeries, false personation, errors in taxing officers, etc. Our customers were all made to understand that a history of each title insured by us was in our vaults, and that such history was open to the inspection of anyone who was entitled to seek information in regard thereto, including the attorney of any such person.

"We have no idea how many thousands of abstracts we have accepted in exchange for title policies, but we do know that it will soon be a problem for us to find filing space for them.

"We believe it a natural human trait not to want to take an irrevocable step, nor to want to 'burn our bridges behind us,' and in thus accepting abstracts and retaining them to be returned to the policyholder if he desires, the feeling is left with the policyholder that he can change his position in the future if he so desires.

"The result has been that shortly after we started title insurance abstracts were frequently called for. This call has lessened, until today it is most unusual for anyone to have his abstract returned. It has frequently happened that when a purchaser of real estate had declined to accept a title policy and had demanded an abstract, that, when the seller and purchaser came to our office to get the abstract, the purchaser accepted the title policy when he found that he could get the abstract when he wanted it." (From "History of Title Insurance in Spokane County, Washington," published by Northwestern Title Insurance Company.)

## CONCERNING TRANSACTIONS IN REAL ESTATE

A real estate broker or agent is defined to be one who negotiates the sale of real property. His business generally is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. A sale of real estate involves many things besides fixing a price. The delivery of possession has to be settled, generally the title to be examined, and the conveyance with its covenants to be agreed upon and executed by the owner, all of which require conference and time for their completion. They are for the determination of the owner, and do not pertain to the duty, and are not within the authority of a real estate agent. For obvious reasons, therefore, the law wisely withholds from him any implied authority to sign a contract of sale in behalf of his principal. *Jones v. Howard*, 234 Ill. 404, 84 N. E. 1041; *Hqllsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, aff. by 26 Sup. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, *Flegal v. Dowling*, 54 Ore. 40, 102 Pac. 178, 135 Amer. St. Rep. 812, 19 Ann. Cas. 1159, *Stengel v. Sergeant*, 74 N. J. Ep. 20, 68 Atl. 1106. And this is so though the price and terms of sale are fully prescribed. Nor can such authority be inferred from the use by the principal and the broker of the terms "to make a sale" or "to sell" and the like. These words in that connection mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms. *Jones v. Howard*, *supra*.

In this country, unless otherwise provided by contract, the purchaser must search the records and determine therefrom the validity of the title, and there is no implied obligation on the part of a seller to furnish an abstract of title. *Spengler v. Sonnenberg*, 88 Ohio St. 192, 102 N. E. 737, Ann. Cas. 1914, D 1083, 52 L. R. A. (N. S.) 510. For that reason an agent for the sale of land who has no express authority from his principal to agree to furnish an abstract of title has no implied authority to so agree; and he cannot bind his principal to furnish one. In the absence of express authority there exists none by implication. *Mitchell v. Hagge*, 160 N. W. 287; *Spengler v. Sonnenberg*, *supra*. So a simple authority to sell at a given figure does not empower the agent to furnish an abstract. *Staten v. Hammer*, 121 Iowa 501, 96 N. W. 964. Even where usage or custom requires the seller to provide an abstract of title, it yet does not follow that an agent having authority to sell for cash can bind his principal by an agreement containing a provision for payment when an abstract shall be furnished showing perfect title in him. *Anderson & Rowley v. Howard*, 155 N. W. 261. Nor does authority to sell for cash empower a broker to contract to sell for so much cash in hand, and balance as soon as deed and an abstract of title are provided. *Gilbert v. Baxter*, 71 Iowa 327, 32 N. W. 364. Where an agent was employed by the owners of certain property to negotiate a mortgage loan thereon, and in connection therewith the owners agreed in writing to pay for making "complete searches" and "all other necessary expenses", it was held that the agent was not thereby authorized to bind his principals to pay for a policy of title insurance. It was the view that "complete searches" and title insurance were distinctly different. Title insurance was considered broader in scope, and required investigation of matters relating to title which "complete searches" might not disclose. Consequently owners would have to lay

bare their titles to the disclosure of every shadow that might impair the reputation and consequent vendability of their titles not required in making "complete searches." This might occasion an expense not confined or at all regulated by the fees and costs of "complete searches." The latter were, therefore, not equivalent to title insurance, and the giving of title insurance not within the express or implied terms of the agreement. Nor would it be held as a matter of law that furnishing title insurance was a necessary expense within the meaning of that clause in the agreement. *Giltinan v. Lehman*, 56 N. J. L. 668, 48 Atl. 540. Of course a broker may not recover the expense of an abstract from his principal ordered without authority from the latter. *Norris v. Walsh*, 205 Pac. 276.

Where one offers to sell land at a certain price, an acceptance at that price upon condition that the vendor furnish a certificate of title is not an unconditional acceptance of the offer, and does not operate as a contract binding the seller. *Lambert v. Gerner*, 142 Cal. 339, 76 Pac. 53.

An agency to sell land without other qualifying provision, confers no authority to sell except for cash. Nor can such agent bind his principal by an agreement requiring him to carry out or perform its terms elsewhere than at his own home or place of business, even though it may be in a distant state. And although the contract be clearly within the agent's authority as to price and terms of payment, yet if the agent assumes authority to insist on provisions not contemplated by the agreement of agency, as, for example, that the seller shall send his deed to a certain bank for delivery, or that the purchase money shall be paid at some named bank, or office, in the vicinity of the land, or elsewhere than at the seller's place of residence or business, or that payment be conditioned upon the seller's delivery of an abstract of title, such added provision vitiates the entire contract and, unless ratified or approved, the agent cannot recover commissions upon any sale so made or attempted. *Anderson & Rowley v. Howard*, 155 N. W. 261.

A custom of real estate agents to take secret rebates or commissions from a party to a transaction other than his employer, or to recover double commissions on a sale or exchange of property, is unreasonable and void, as contrary to good morals and sound public policy. The custom does not alter the well-settled general rule that a real estate agent, other than a mere middleman, employed to purchase, manage, sell or exchange property, may not take a commission or rebate from the other party to transactions within the scope of his agency without the full knowledge and assent of his principal. If he does so he forfeits his right to compensation from his employer. So where an agent was to manage and dispose of real property and receive as compensation half of the net profits derived from the sale of the property, he was held to have forfeited his right thereto by reason of having taken secret rebates on sums expended for repairs made upon the property, and by charging his principal more than he, the agent, had paid for legal services rendered in connection with the transaction,—charging the principal \$50 for attorney fees for which \$25 had been paid. *Little v. Phipps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. N. S. 1046, and note.

Any profit made by an agent beyond his ordinary compensation in the execution of his agency must be accounted for to his principal, who may claim it as a debt for money recovered to his use. And this has been held applicable even though the agency is gratuitous. So an agent authorized to

sell land at a given price who succeeds in realizing more, or who is empowered to purchase at a given price and buys for less, or who is employed to settle a claim at a given sum and secures a reduction, must account to his principal for the gain obtained, as it is the profit of the latter. *Wald's Pollock on Contracts*, 3 Ed. p. 390 and note; *Mechem on Agency*, sec. 1226. Hence money paid to the agents of the insured by the agents of the insurer, for the taking out of insurance in the companies of the latter, belongs to the principal as a profit of the agency, even though the cost of the insurance to the principal was not thereby increased. *Patterson v. Missouri Glass Co.*, 72 Mo. App. 492.

That a broker may not accept a commission from a party to a transaction other than his principal, is subject to one exception supported by practically unanimity of the authorities. That exception is where a broker acts as a middleman in bringing two parties together who make their own bargain without any aid from him. In such cases he may recover compensation from either of the parties or both though neither may know he is to be compensated by the other. But if in such cases the broker takes or contracts to take any part in the negotiations, he is not to be regarded as a middleman; as where he serves the buyer, and in the negotiations endeavors to depress the price and arrange conditions favorable to him. *Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Amer. Dec. 416 and note; *Leathers v. Canfield*, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33 and note.

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#### RECENT DECISIONS: CURRENT LAW.

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Delivery is necessary to make a deed valid. *Selby v. Smith*, 134 N. E. 109. Its registration is considered a delivery. *Jamison v. Wells*, 236 S. W. 806. To constitute a delivery it is not necessary that it be actually handed over to the grantee, but it must appear, circumstantially at least, if not from acts or express words or both, that the grantor intended to part with the deed and pass the title. *Rommell v. Happe*, 115 Atl. 906. A delivery to a third person as grantor's agent, without any direction to deliver to the grantee, does not constitute a delivery. *Selby v. Smith* 134 N. E. 109. But a valid delivery is effected when the grantor places the deed in the control of a third party without reserving the right to recall or revoke it, to be delivered after the grantor's death. *Weir v. Hann*, 134 N. E. 52. And delivery in escrow to a person other than the grantee for delivery after the death of the grantor, where there is actual delivery and loss of dominion of the deed by the grantor, is sufficient to convey the title. *Selby v. Smith*, 134 N. E. 109. In such case the deed takes effect not at the time of death of the grantor, but immediately upon being delivered in escrow. *Phenneger v. Kendrick*, 133 N. E. 637. Ordinarily, the execution of a deed by a husband to his wife, though he retains possession thereof, constitutes a complete delivery, whether the deed is registered by him or not, in the absence of a contrary intention. *Jamison v. Wells*, 236 S. W. 806. Delivery is a question of fact to be determined by ascertaining the intention of the parties to it. *Bruce v. Albaugh*, 186 N. W. 366.

The surrender to the grantors by the grantee of an unrecorded deed, with agreement that it be destroyed, does not effect a reconveyance of title from the grantee to the grantors. But, in view of the statute of frauds, the grantee

by so doing cannot assert title in himself as against a subsequent grantee of the grantors. *Kempf v. Michelbach*, 115 Wash. 193.

The loss or destruction of a deed by a husband to his wife does not divest the wife of title to the land conveyed by it. *David v. State Bank of Groom*, 238 S. W. 979. And where a husband, while not indebted, validly conveys land to his wife by a deed that is lost and unrecorded, his subsequent deed to her, executed while he is insolvent, of the same land, is not void as to creditors, since it takes nothing from them which they had a right to rely on for payment of their claims. *David v. State Bank of Groom*, *supra*.

Where property is conveyed to be used for a specific purpose, failure to use it for that purpose will not forfeit the title if a valuable consideration was paid, unless the conveyance expressly so provides, but the stipulation is to be construed as a covenant and not as a condition subsequent. *National Finance Corporation v. Robinson*, 237 S. W. 418.

A covenant of warranty in a deed warrants against known as well as unknown defects and incumbrances, and knowledge on the part of the grantee of the existence of an incumbrance or defect, does not ordinarily militate against the covenants contained in the deed. *Fagan v. Walters*, 115 Wash. 454.

General covenants of warranty in a deed extend only to any existing defects in the title to the land conveyed. And if by the deed the fee title vests in the grantee and possession be given, the covenants cease to have any further active legal effect. They do not prohibit the grantor from subsequently acquiring title to all or any portion of the land through any means recognized by law for the acquisition of title. *Griffith vs. Wynne*, 236 S. W. 171.

A tenant who has mortgaged his leasehold, has no power to destroy the interest of the mortgagee by surrendering the lease to the landlord. *Jacob Hoffman B. Co. v. Wuttge*, 193 N. Y. Supp. 79.

The doctrine of *idem sonans* applies to records. Hence, the record of a mortgage by Thomas F. Bermingham is constructive notice of one given by Thomas F. Birmingham. *Downer v. Birmingham*, 205 Pac. 948.

By a curative act the legislature cannot transfer title from one person to another. *Ostrander v. Bell*, 192 N. Y. Supp. 262. But in the absence of a constitutional inhibition the legislature may validate by curative act any proceeding which it might have authorized in advance. *Alatalo v. Shaver*, 186 N. W. 872.

The opinion of a lawyer favorable to the legality of a title, however skilled he may be as an abstracter and learned in his profession, will not exonerate purchasers from diligent investigation of the title; and they are bound by the facts which an investigation would have disclosed. *Krow & Newman v. Bernard*, 238 S. W. 19.

Where a right of action exists in favor of two minors, that of the elder will not accrue until the youngest attains his majority. *Krow & Newman v. Bernard*, *supra*.

A will providing, "In the event of my leaving legitimate issue I annul this entire will and give, bequeath and devise to my wife my entire estate, whether the same be real, personal or mixed property, to herself, her heirs, executors and assigns, in fee and absolutely free from any trust or restrictions," mentioned after-born children within the meaning of a statute pro-

viding that an after-born child not provided for by settlement, nor in any way mentioned in the will, shall succeed to the same portion of the parents' estate as if the parents had died intestate; and, under the terms of the will after-born children are not entitled to any portion of the estate. *In re Dick's Will*, 191 N. Y. *Supp.*, 762.

The legislature may impose a succession tax upon all inheritances or successions that may occur subsequent to the passage of an act, regardless of the value thereof, and without any exemption. The so-called right of inheritance and also of testamentary disposition, are not inherent rights of the individual, nor are they safeguarded or secured in future by any provision of the Constitution. They are both subject to legislative control, and are creatures of legislative will. Consequently the legislature has the power to take away both rights, and to make the state the successor to all property upon the death of the owner. The right and power to impose a succession tax rests on this principle. *In re Potter's Estate*. *Cal.* 204 *Pac.* 826.

It is settled law that an inheritance tax is levied on the transfer of title, or on the exercise of the right to transfer the title, including the right of the transferee to receive it, and not on the property itself. While the provisions imposing the tax on prior transfers in contemplation of death, or with intent that they take effect in enjoyment at death, are but safeguards against attempts to evade the tax, the recipient of a present transfer of that character is bound only for the inheritance tax due upon it under the law in force at the time the title passes, and the legislature has no power to raise the rate or increase the tax on such transfer by a subsequent act. *In re Potter's Estate*, *supra*.

It is also settled that the right to such tax vests in the state at the date of the taxable transfer, and that the legislature cannot, by subsequent acts, reduce the rate of taxation thereon, since to do so would be to make a gift of the property of the state to the extent of the reduction contrary to the constitution of the state. *In re Potter's Estate*, *supra*.

A transfer made subject to an inheritance tax because not intended to take effect in enjoyment until the donor's death, is subject to the tax payable and exemption allowed under the act in force when the transfer is made, and not governed by a later act in force at the time of the donor's death. *In re Potter's Estate*, *supra*.

Where there is no statute permitting collateral heirs, that is to say, heirs who are not descendants, who are non-resident aliens to inherit, the common-law rule obtains. Under that rule a non-resident alien has no inheritable blood and cannot take title by descent. But the treaty with Great Britain provides: "Where, on the death of any person holding real property \* \* within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term may be reasonably prolonged if circumstances render it necessary." And this treaty controls and suspends the common law in force in a state as to the rights conferred by it, during such time as they are in force or intended by the courts pursuant to it. And the title acquired by non-resident aliens by virtue of the treaty giving them the right to sell, carries with it the ownership as a necessary incident of the power of

sale. The provision in the treaty that heirs be allowed three years in which to sell their inherited lands, does not make their rights as heirs cease *ipso facto* at the expiration of the three years, since the time may be prolonged if circumstances render it necessary. What such circumstances may be is a question for the courts. The term "territories" in the treaty must be construed as meaning any area or locality under the dominion of the United States. *Bamforth v. Ihmsen*, 204 Pac. 345.

## STATE STATISTICS AFFECTING ABSTRACTERS AND INSURERS

Arkansas: Certifying and guaranteeing titles to real estate is one of the powers conferred upon trust companies. Three or more persons may organize one. It must have a paid up capital of not less than \$100,000 in any county having a population in excess of 50,000; \$75,000 in a county having a population in excess of 40,000 but less than 50,000; and in no case a capital less than \$50,000. The last United States census of population to govern. Digest & Stat. Ark. by Crawford and Moses; 1921; secs. 747, 748.

Illinois: Corporations may be organized to guarantee or insure titles to real estate. No specific capital requirements; but a deposit must be made with Auditor of Public Accounts of \$50,000 in order to conduct such business in counties of over 300,000 population, and of \$25,000 as to other counties; the deposits to be specified securities. Ill. Rev. Stat. 1921; Cahill: c. 32, secs. 364, 365.

Louisiana: Title insurance companies must have paid-up capital of not less than \$100,000, and must deposit with State Treasurer \$25,000 in money or securities. Title insurance companies having a paid-up capital of not less than \$500,000, and depositing \$50,000 in addition to the \$25,000, may also guarantee fidelity of persons and act as surety on bonds. Const. & Stat. La., Wolff, 1920, Act 170, 1916, p. 398.

Minnesota: A title insurance company must have a capital of \$200,000; must set apart not less than two-fifths, and not less than \$100,000 in any case, and two-fifths of any increase of capital stock, to be maintained unimpaired for the payment of losses on account of its guaranty and insurance contracts. Stat. Minn. 1917 Supp. Amend. Act 1915, c. 196, sec. 1.

New Jersey: Title insurance company must have a capital of \$100,000 paid up in cash, and must deposit with the Commissioner of Banking and Insurance, \$50,000. Comp. Stat. N. J. First Supp. 1911-1915, sec. 3, p. 809; sec. 4, p. 810.

Worrall Wilson, who during his terms as vice-president and president of the American Association of Title Men initiated and secured the adoption of the plan resulting in the employment of a salaried secretary by that association, and who in other ways made an unsurpassed record, has many achievements to his credit in the Northwest. He effected a merger of the Title Trust Company and Seattle Trust Company, the resulting company being the Seattle Title Trust Company, of which Reginald H. Parsons is chairman of the board and Mr. Wilson the president. Under the latter's active and directing leadership the company has had a splendid growth of business in the short time that has elapsed since it was organized. The company has, according to its last published statement, a capital of \$500,000: surplus, \$56,250; undivided profits, \$22,911.39. Its resources total \$729,431.20. The trust department has uninvested trust funds of \$31,219.95; trust investments of \$1,361,255.24; real estate held in trust to the value of \$2,505,850, and is trustee for bond issues amounting to \$3,701,050.

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#### BAD FOR TORRENS TITLES

The opinion of the New York Court of Appeals by Crane, J., holding that in an action for dower the testator's grandchildren, having a contingent remainder in the real estate, are necessary parties defendant; that making children who are given a vested remainder in the property defendants is not enough; the living contingent remainderman must also be brought in in order to give to the purchaser at a sale under the judgment a title which he is bound to accept.

This was an appeal by plaintiff from an order of the Appellate Division, Second Department, affirming an order of the Special Term, which relieved a purchaser from his purchase of real estate under a judicial sale in a dower action.

Peck & Schmidt (Chas E. George of counsel) for appellant.

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#### NO TORRENS LAW FOR NORTH DAKOTA

That several counties in North Dakota have little or no use for the Torrens law is evidenced by the reply of the Register of Deeds in Barnes County, to a query as to the success of the measure in his territory. His reply follows:

"The Torrens system has not as yet been tried in this county, nor does there seem to be any desire for same.

"As you perhaps know, it is optional with the counties whether or not they wish to establish the Torrens system."

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#### A NEW YORK EXPRESSION

The Title Guaranty and Trust Company of New York writes:—

"Your 1921-2 Select List of Real Estate Lawyers, Abstracters and Title Men received. It is the most complete and valuable list of reputable title experts ever compiled. Our Association should heartily co-operate with you and give The Lawyer and Banker deserved support."

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#### IT WAS BUILT FOR TITLE MEN

Mr. Richard B. Hall of Hutchinson, Kansas, Editor of The American Association of Title Men's *Bulletin* on July 6th, 1922, wrote the Editor.

"The Hand Book issued by the Lawyer and Banker received and I certainly want to compliment you on this piece of work. It is most valuable and complete and one of the most practical and useful directories one could have."



# BANKING AND FINANCIAL LAW

## ESTATE TAX IS ALLOWABLE DEDUCTION

An interesting case construing the income tax law was recently decided by the Supreme Court of the United States. The case referred to was entitled *United States vs. Woodward*, 41 Sup. Ct. Rep. 603. In this case the executors of a decedent had paid an estate tax of \$500,000. Thereafter, when they made their return of the income of the decedent's estate, they claimed the amount paid as an estate tax as a deduction. The claim was disallowed. The question presented by these facts was stated by the Supreme Court as follows: "Was the estate tax paid by the executors, and claimed by them as a deduction in the income tax return for the year 1918, an allowable deduction in ascertaining the net taxable income of the estate for that year?" After a discussion of the two laws involved, the court held that the estate tax was an allowable deduction.

## SAVINGS BANK LIABLE FOR PAYMENT

The usual by-law of savings banks that the bank shall not be liable for payments made to any person who presents the passbook of a depositor unless the depositor has notified the bank that the book has been lost or stolen before such payments are made, does not exonerate the bank from liability for making a payment to an impostor who presents the deposit book, when it is negligent in making such payment. This was held in the recent case of *Minoff vs. Hazel Green State Bank*, 183 N. W. 673. In this case the deposit book of the depositor had been stolen and had been presented by the thief to the bank, together with a forged check. The bank paid the check. Later it was notified by the depositor that his deposit book had been stolen. The trial court decided that the bank had been negligent in making the payment and that it was for that reason liable, despite its by-law. The appellate court upheld this judgment. In doing so, the court said that it was undisputed that the defendant bank was not liable if in making the payment it had exercised ordinary care. But the court found that the finding that the bank had been negligent in making the payment was certainly supported by the evidence. The name of the maker on the forged check was misspelled and the writing of this name was materially different from the writing of the depositor. Under these circumstances the court held that the bank should, in the exercise of ordinary care, have required proof of the identity of the person making the signature.

## GUARANTOR CHARGED BY CONDUCT OF PAYEE

Cases often arise in which the courts must determine whether or not a guarantor of a promissory note is discharged from liability. The recent case of *Farmers State Bank vs. Hansen*, 182 N. W. 944, was such a case. In this case Hansen had guaranteed the payment by Nelson of a promissory note executed by the latter to the bank. When the maturity of this note was reached, the bank and Nelson arrived at an understanding that the note should be allowed to stand until a partial payment had been made

thereon, and that in the meantime Hansen would not be informed that the note had not been paid upon its maturity. Nelson then told Hansen that the note had been paid, but this was done without the knowledge of the bank. The guarantor claimed that under these circumstances he was discharged from all liability. In passing on this contention the court recognized the rule that any action on the part of a creditor after a note becomes due which amounts to a fraud on the guarantor of the note, which misleads him as to the fact of the non-payment thereof and lulls him into the security that the note has been paid, and by reason thereof the guarantor is placed at a disadvantage and loses an opportunity to recoup and protect himself, may operate to discharge the guarantor. It is said, however, that the conduct which will operate as a release of the guarantor cannot arise from mere passivity on the part of the creditor, but it must consist of some affirmative act or connivance or gross negligence amounting to a fraud on the guarantor, in order to work his discharge. The bank in this case was under no obligation to notify Hansen that the note had not been paid. For this reason its failure to give Hansen notice amounted to mere passivity and could not possibly be construed as a fraud upon him. It followed that Hansen was held liable on his guarantee.

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#### PROMPT NOTICE OF FORGERY NECESSARY

When a payee of a check is negligent in notifying the bank upon which the check is drawn that his endorsement thereon is forged he forfeits all right to recover against the bank for the payment of the check upon the forged indorsement. This was the decision reached in the recent case of *Annett vs. Chase National Bank*, 188 N. Y. S. 8. In this case a draft had been drawn upon the Chase National Bank in favor of Annett and delivered to his attorney. In October, 1918, the attorney had forged Annett's indorsement and had collected the draft. Annett discovered on February 1, 1919, that his attorney had forged his signature, and three weeks later he learned the name of the bank upon which the draft had been drawn. He did not thereupon immediately notify the bank of the forgery; on the contrary, he negotiated with the forger for two months before notifying the bank. The court held that this delay conclusively established negligence on the part of Annett and precluded a recovery by him.

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#### INHERITANCE TAX AND TRUSTS

The important principle is sustained by the Supreme Court of Connecticut, in the recent case of *Blodgett vs. Union & New Haven Trust Co.*, 116 Atl. 909. that inheritance tax law goes into effect when a trust deed is delivered, and not at the time of the death of the creator of the trust.

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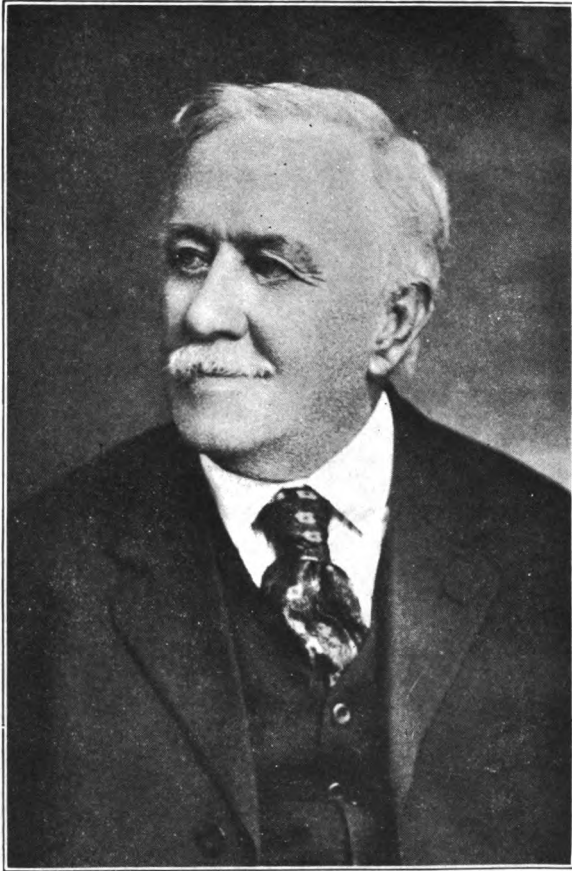
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# THE Lawyer and Banker AND SOUTHERN BENCH AND BAR REVIEW

CHARLES E. GEORGE, Editor  
FRANK C. HACKMAN, Associate Editor

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## *ITA LEX SCRIPTA EST*

*The Human Spirit will Be found in every  
line of reading matter in this issue.*

### LABOR UNIONS AND IMMUNITY

Laws applying the same principles to labor organizations as to corporations are bound to come. It is a part of industrial evolution.

Regulation of corporations began as soon as they began to be powerful. Even in Queen Elizabeth's day corporations developed rapidly and soon were exerting an influence on government. It became necessary to devise drastic laws for their regulation.

When labor unions were struggling for existence, when workmen were organizing to improve their condition and obtain better wages, the sympathy of the public was with them. The idea of union was strong in the land. The country had just preserved the "one big union" of these United States. Our economic organization was under full headway and there was no general disposition to forbid to workmen rights that were accorded corporations.

Until recently the lobbyists for labor could go into Congress and demand that the labor unions be made immune from the application of the provisions of the Sherman Anti-Trust Law and any other laws designed to prevent monopoly or restraint of trade.

Power had given the labor union the disposition to misuse power. Labor organization was taking the customary course. Its evolution was not surprising. But meantime, it was losing the sympathy of the

public. It was no longer weak. It was strong and was exerting its strength to dominate government and injuriously affect public interests.

Strikes had always been in restraint of trade and widespread strikes had always been in restraint of interstate commerce, but while corporations were being held to strict account for such restraints the labor union, on the theory that the workers needed public protection because of their weakness, were accorded immunity.

Nor had the principles yet been established that labor unions were responsible in damages for losses caused by strikes. That liability is just beginning to be enforced by the courts.

And now that labor unions have acquired a dominant position and are able, at almost a moment's notice, to stop the wheels of industry from coast to coast; now that they can enforce their demands by coercing the entire public of the country, they are no longer justified in demanding or receiving immunity from the laws that hold other powerful organizations in rightful check.

We favor a law compelling every labor organization to incorporate. Next create a National Court with district branches that shall have exclusive jurisdiction of all labor disputes and place back of its decisions the full force of the United States.

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The cause of the prevailing restlessness and discontent is too much government rather than necessity for additional legislation.

Every lawyer is conscious of the process of centralization. The sphere of Federal activity is constantly expanding and Federal agencies are being rapidly multiplied. The States and their subdivisions have been repressed, until the last stronghold of local authority, the police power, is threatened by Federal encroachment.

The disease which afflicts the body politic is so complicated that the patient can not describe the symptoms and the doctors can not correctly diagnose the illness. Nothing is worse needed than a cure for the prevailing neurotic fanaticism which manifests itself in clamorous calls for legislation which in the long run must prove harmful rather than beneficial.

Approximately 16,000 written statutes, including municipal ordinances, are applicable to the government of the conduct of citizens in the various municipalities. The public mind would be calmed and comfort and happiness would be promoted if one-half of these, judiciously selected, were at once repealed.

The fanatical tendency toward excessive law making is demonstrated by the introduction during the last session of Congress

of 16,170 bills in the House of Representatives and 5,052 in the Senate, making a total of 21,222, not including resolutions and joint resolutions to the number of about 2,000-

A sane program for the restoration of whole-hearted confidence in the Government might well include the following policies:

1. More deliberation in the enactment of laws and the repeal of unnecessary, vexatious, and admittedly unpopular statutes.

2. The simplification of all laws continued in force. Federal revenue acts, especially income-tax provisions, are notable instances of complex statutes which no one subject to them fully understands.

3. Rigid and impartial enforcement as the surest means of compelling the repeal of obnoxious statutes and of creating a spirit of obedience to law.

The notoriously frequent, and in some localities open violations, of the national prohibition act are creating a spirit of contempt for law and are tending to convert the American people into a nation of lawbreakers. The inauguration of national prohibition was premature in the sense that public sentiment in many communities did not approve it, and wherever that was true it has been difficult, almost impossible, to enforce the law. Nevertheless, while the National Constitution and statutes provide prohibition, there is no honorable course to advocate or pursue save rigid and impartial enforcement-

4. The creation of higher standards of public duty for the citizen and the officer as the certain means of destroying the power of organized selfishness now threatening to dominate the Government.

5. An intelligent and comprehensive study of the various phases of industrial life with a view to the establishment of just tribunals for the investigation and adjustment of disputes likely to result in strikes and lockouts.

6. A nation-wide campaign, led by lawyers, to refine the administration of justice as the surest means of stabilizing our civilization and of perpetuating high ideals in American citizenship.

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### EDITORIAL COMMENT

The lawyers of this country and the laymen as well have watched for more than twenty years the increasing interference of government in private affairs; the growth of a paternalism that is as obnoxious as it is expensive; the centralization of government to the destruction of state and popular individualism; the foisting of fool theories of uplift by law and by regulation on a people who have won to the front of the world by lifting themselves



instead of being lifted by statute; the spread of a smear of messy socialism under the guise of common-good flubdub; the ceaseless forays against business—the agency that chiefly has developed this country to its present supremacy—that seek to restrict and hamper and direct and confuse business, not for sound economic reasons but for unsound political reasons, and do almost confiscate it by taxes; the capitalization of Congress by any special interest that comes with a threat of political reprisal unless its special demands are heeded; the spying, censoring, uplifting, reforming, regulating and restricting of liberties of both speech and action; the expansion of the class idea in legislative methods and influences; and with it all the vast complexities and the devastating expense of this sort of government that proceeds on the assumption that the United States is a corrective institution, with the people inmates, instead of a co-operative establishment with the people partners.

They have watched for more than twenty years the decay, so far as government is concerned, of the old, vigorous and successful American policy and creed of individualism and self-help, and have been messed and mused about; taxed to the point where thrift and effort are penalized; regulated, restricted, uplifted, reformed and directed in their ways and walks by a crowd of political shysters whose only motive is self-interest; overwhelmed by an avalanche of useless and expensive laws and exploited by class legislation that had its selfish warrant in the desires of the class legislated for, regardless of the people, and the political necessities of the legislators who framed it. The people have seen the growth of a bureaucracy that has increased ten-fold since the beginning of this century, and the expansion of the commission idea until commissions barnacle the ship of state in such numbers that little of the original hull can be seen, each commission providing salary and sustenance to politicians at the expense of the people, and not one in ten of them worth 5 per cent of what it costs.

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A proposition is being urged upon the people of the United States to pass an amendment to the Federal Constitution, under the terms of which the courts shall be deprived of their power finally to decide as to the constitutionality of legislative enactments, by giving to the Congress the power to annul or veto any decision of the Federal Supreme Court declaring a Federal statute unconstitutional, or by making any such judicial decision subject to recall by legislative or popular referendum.

Such amendment would have the effect of nullifying the safeguards of our Constitutional government for the protection of the rights of the individual and of minorities against encroachment and oppression by the whim of majorities, and would lead to a government by the temporary whim of legislative or popular prejudice, and to inconsistency, inequality and discrimination in the application and enforcement of constitutional safeguards, and thereby be subversive of our Constitutional democracy.

The adoption of such amendment would have the effect to eliminate all distinctions between the powers of legislation which have by the Constitution been retained by the respective States and those which were specifically granted to the Federal government, and would thereby tend to deprive the States of their reserved rights of self-government, and to centralize all powers of government, local and national, in the Congress,

according as the Congress might from time to time choose; and thereby such amendment in the aforesaid respects and in other respects would tend to become the basis of arbitrary and unlimited legislative powers in the Congress to disregard, in chosen instances, all other Constitutional limitations on legislative power, and through such processes to change our system of government from a government by law to a government by men; and further, would tend to leave the individual citizen and minorities subject to the caprices and whims of temporary majorities and without the protection of the safeguarding principles of the Bills of Rights established by Magna Charta and written into all American Constitutions, State and Federal.

The advocacy of such Constitutional amendment can be founded only upon disregard or ignorance of those principles of government which have made our American system the most efficient protection against oppression and a scientific model for the establishment of Constitutional democracies having in view the freedom of the citizen from the tyranny of either a pure democracy, on the one hand, or of an arbitrary monarchy or oligarchy, upon the other hand.

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#### IMPORTANT BUSINESS TRUST DECISION

A trustee of a common-law trust company, organized and existing in pursuance of a declaration of trust recorded with the county recorder, was arrested and charged with violating the provisions of the Blue Sky law of the state. The company was not incorporated and the prosecution was for selling unit interests in the company without having secured a permit from the corporation commissioner. The trustee applied for a writ of habeas corpus to the Supreme Court of California, where the writ was denied in *ex parte Girard*, 200 Pacific Reporter 593. The constitutionality of the act was attacked on the ground of discrimination in permitting testamentary and judicial trustees to sell securities issued by such trustees without a permit, while forbidding it in the trust under consideration. Judge Shaw wrote the opinion, in the course of which he said:

"The trust here involved is a striking example of the practices which the Legislature intended to prevent. The corporation commissioner is required to investigate concerning the assets of such a trust, and to refuse to permit it to do business unless upon such investigation he finds that the proposed plan of business is not unfair, unjust or inequitable, and that the company intends to fairly and honestly transact its business, and that the securities it proposes to issue and the methods to be used in disposing of the same are not such as in his opinion will work a fraud upon the purchaser. Conceding that the business intended to be done would be legitimate and lawful, it is evident from the experience of mankind that it is of a character which renders it justly subject to regulation, as much so as that of the corporations towards which the law is principally directed."

The trustees in the present case sold unit interests in a business conducted by them for the buyers. They held the title of the trust property,

and issued certificates, transferring to the holder a proportional interest in it.

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Are you buying a home? If you are, is the property you are making payments on held in trust by some responsible trust company? Or, if you're only negotiating with some subdivision concern for a lot, have you asked them if the property they're trying to sell you is held in trust?

This is a point that's mighty important, and the fact that it's not universally insisted on by the home buyers is disclosed in the number of subdividers operating without protecting their customers in this manner.

Of course, every subdivider that puts his property in trust isn't a monument of integrity. There's one subdivision company doing a fair sized business which has anything but an enviable reputation in the realty world, but which points with much pride to the fact that its property is held in trust. It doesn't call attention to the fact that it was turned down by practically every mortgage banker and trust company in town before it found a small loop bank to act as trustee.

We mention this to emphasize the importance of the prospective buyer seeing that the trustee is a responsible banking house. There is nothing more valuable than the protection of the contract holder.

We believe that all subdivision properties and others as well, either for home, investment or subdivision lots, if arrangements can be made, should be put in trust for the protection of the contract holder, so that when the contract is paid in full the buyer will have no difficulty in getting the deed, there are two ways:

First, if a property has no mortgage on it, a responsible trust company should take title to the subdivision or real estate. A trust company won't take title to property under a trust agreement as trustee if it has a mortgage on it. For example, if a contract is issued for a subdivision lot with a responsible trust company as trustee of the property, calling for restrictions and improvements, the trust company will be responsible for the carrying out of these improvements and the enforcement of these restrictions. A trust company never dies—an individual will. The individual also may have trouble with mechanics' liens; he may mortgage the property after being sold; his wife may refuse to sign deeds; he may become mentally incompetent. In any case, he couldn't give a clear title to the property after the contract was paid in full. In the last two instances it would be beyond his control. If a trust company is trustee of property when the contract is paid in full, any two officers of the trust company may sign the deed.

The second way is by forming a syndicate, one of which may be selected as trustee through a trust agreement. This is used mostly in building, where there may be a mortgage, as a trust company doesn't care to hold property in that case. But the trustee may have the power to mortgage the property, sign notes, etc., and, in the event of his death, the majority of the members of the syndicate may select another trustee.

We feel that there is nothing more valuable than the protection of the

contract holder. In 95 cases out of 100 they work very hard for their money where real estate is bought on a contract. We feel that this man should have all the protection that can possibly be given him, as he has no money for hiring lawyers to help clear up his title.

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By virtue of a law quietly passed in New York in 1920, parties agreeing to arbitrate, or under contract to do so, must abide by the judgment of the arbitrator without appeal. No evidence will be ruled out on technical grounds as "irrelevant," "immaterial" or "incompetent." The common sense of the arbitrator will be supreme and the proceedings aimed simply at determining the facts. There will be no marshaling of expensive and contradictory expert testimony, no falsely dramatic appeal to the passions and the prejudices of jurors. The arbitrator has power to summon witnesses, and when his judgment is rendered it may be enforced like any other judgment. A large number of business and professional men of high standing have offered to serve as arbitrators without compensation. Thus the determination of disputes will not only be far more speedy, but will be so inexpensive as to place rich and poor on an equality before the law. If arbitration proves as effective as its champions expect, the volume of litigation in the regular courts will be reduced by 75 per cent, leaving little besides criminal and divorce cases.

Upon the morale and conduct of business the effect should be marked. A man who agrees to arbitrate agrees to stand by the best opinion of the world of which he is a part, and to bare the truth of his conduct to the most searching scrutiny. A man who refuses to arbitrate, by that very fact brands himself as seeking some other standard. Under the old procedure, law and justice are far too often at odds. Men normally honest, when caught in the toils of a legal battle, frequently feel obliged to resort to devices which their better sense disapproves. Arbitration gives the best judgment of the community free and authoritative expression, thus invigorating the spirit of local self-government. That the award of an arbitrator will be always just is, of course, not humanly possible; but it will clearly be the best obtainable expression of the enlightened sense of the community.

On the Continent procedure in civil causes has traditionally partaken of the nature of such arbitrations. England is far in advance of us in reforming ancient methods. The Arbitration Society is endeavoring to extend the movement to other States. So long as it is backed, as at present, by capable and public-spirited citizens there can be little question of its success.

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The legitimate need for money, left unsatisfied, makes young men thieves and young girls shameless. It makes anarchists and "bums" out of honest working-folk. It makes beggars out of self-respecting people. It makes straight men sneaks.

One may not expect in these restless days of socialistic and "red" agitation that the multitude will stand by forever humbly and be thankful for inadequate facilities. If we are to fight Bolshevism, we must deprive its advocates of all just cause for complaint against our modern civilization

and economic life. It has been in many cities a just complaint that adequate provisions have not been made for the necessary and legitimate borrowing needs of the working class. The result is that many are restless because they feel that their interests and their rights have not received due consideration.

There is no reason for this great gap in the money loan service supplied to citizens of our country, except the inattention of the public to a great necessity. As Theodore Roosevelt once said: "This country will not be a better place for any of us to live until it is a better place for all of us to live in."

As a moral risk and as a risk that offers obligations and security that are certain and realizable, the industrial borrower is on a par with commercial borrowers. This has been clearly seen for years by public-spirited persons and organizations, and many have been the attempts to introduce a small loans service to take care of the need of the average man.

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## SOUTHERN STORIES

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### Cruelty in Art

"Colonel, would it be against the law to paint a picture of a mint julep on a billboard?" asked a Jackson (Miss.) business man of a well known local lawyer.

"I don't know whether or not it would be against the law, sir, but it would be an act of senseless cruelty to about 90 per cent of our male population."

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### Same As Before

"And your friend really married his typist! How do they get on?"

"Oh, same as ever. When he dictates to her, she takes him down."

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### Nothing Left to Finish

"Would you be interested in something to finish your furniture, madam?" asked the salesman at the door.

"No," said the housewife, sadly. "We had a home-brew party here last night."

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### Circumstantial Evidence

The late Chief Justice White was in his early practice defending a young negro on a larceny charge. During the trial the prosecuting attorney asked the darky to stand up. The darky hesitated. White asked why. "You are innocent, aren't you?" "Yes, I'se innocent, just as long as my feet am under dis yer table; but good Lor' Jedge, when I stands up, I'se got dem pants on."

# FIXING THE LAW AND FINDING THE LAW

By James M. Kerr, of Pasadena, California.

In the "profession of the law" the two great objects to be attained are, the "fixing of the law" and the "finding of the law." The acolyte of Themis, when he enters upon his study of the law, is confronted with the task of "fixing the law" in his mind; that is, of acquiring a comprehensive understanding of the law in its various inter-relations, and of mastering the fundamental principles which underlie all law, and which do or should guide all courts in administering justice to the conflicting interests of litigants.

These fundamental "concepts" are multitudinous and indispensable to the attainment of proficiency and power in the legal world. I use the term "concepts" in the sense of a grasp of the full scheme of law, the synthesis of all its constituent attributes or properties, and the separating of the various "concepts" into groups with allied and mutually-helpful characteristics and functions, and acquiring the power to call upon the particular "concept" or fundamental underlying principle which must rule in a given state of facts and furnish the key for the solution of a knotty problem of law presented in the shape of an "instance case" to be adjudicated and determined.

These concepts or fundamental principles of law governing in any given cause, in all causes,—except perhaps a cause presenting a very simple complex of facts and principles, involving a single elementary right sought to be established or wrong sought to be redressed,—will be found to be as inter-locking as the directorates in a full-fledged modern trust of the pernicious variety. Before the novitiate is fitted to "hang out his shingle" and solicit causes to be handled and tried by him, he should master a reasonable number of the more elementary and most-frequently-applied-in-practice of these fundamental principles upon which all law is founded in civilized communities. It is not to be expected that the novitiate striving for a "license" to enable him to appear before and to "practice" in the courts, will or can master all the fundamental principles underlying the law; that is the work of a lifetime of earnest endeavor, and it is attained by but few who labor for that end. What distinguishes a man in the profession of the law is the acquisition and full mastery of these fundamental principles to a greater extent and in a larger number of instances than is attained by others,—and the majority of laborers in that field,—together with the power to summon unerringly to his aid that particular fundamental

principle, or those inter-locking fundamental principles, by which any given knotty problem is to be solved.

Where is the student to search for and find these fundamental principles; and when found how can he most successfully "fix" them in his mind and subject them to his power and purposes to the extent that the proper fundamental principle may be summoned when required? This is the age-old problem that has ever confronted the laborer in the vineyard of the law. Shall the student delve into the acts passed by the legislature, expecting to find therein intelligently and systematically set forth these fundamental principles of the law, embodied in plain rules for the guidance in right-living and in the intercourse of man with man? This were a vain search. Statute law is not fundamental law. It is true that, in the very nature of things, a statute is a "rule of conduct" in relation to the specific thing regarding which it seeks to provide regulations; but it is not "fundamental" in any sense, except that it is to be followed and obeyed by all "good citizens"—usually a small select minority in any community—for the time being, only. A fundamental principle covers all classes residing within the state, and endures for all time. A statutory law is, at best, but a temporary expedient, changed or repealed at the whim of the legislature, which may be composed of well-meaning men drawn from all walks of life, but who have no mastery of the reasons and rules embodied in the fundamental principles of law; they may have no proper conception of their duties and responsibilities as legislators; may not be men of broad minds and enlarged vision, and have no grasp of the thing needful for the general welfare of the people as a whole. Perverse conceptions, half-baked ideas, sordid self-interest, too frequently find their way into the statute-books; and are not infrequently a violation of, rather than an embodiment and enunciation of, the fundamental principles lying at the root of all law and civilized governments. Surely it is against all fundamental principles of law, and contrary to any sound conception of sane government, to accord special privileges to a few or a class, and not accord the same privileges and exemptions to the citizenry of the community or state.

A statute is not "law" in any proper sense of that term, although found upon the statute-books, which accords to a small class a special privilege and exemption enabling the few to oppress and wrong the many. A statute is not "law," although upon the statute-books, which enables three per cent. of the citizenry with impunity to declare economic war upon the other ninety-seven per cent. of the state or nation, in order that the three per cent. may forward sordid and selfish designs touching their own private affairs, causing the ninety-seven per cent.

to suffer inconveniences, not infrequently hardships, privations, and even want, in addition to loss of property and business through violence and wanton destruction, accompanied not infrequently by wilful assaults and bloodshed. No "strike" is lawful," although it may have thrown around it the protecting ægis of the legislature! To "strike" is to combine and conspire to injure another man in his business, or to compel him to do that which he would not otherwise, and of his own free will, do. To conspire to injure is criminal and punished as felony, in all matters and relations in life—except in the world of labor; the act is essentially a criminal act under the fundamental principles of law, and no act of the legislature can make it otherwise. Wilful and wanton destruction of property, vicious and unjustifiable assault and bloodshed, are felonies under the fundamental principles of law, and no act of the legislature can change their character by giving special privileges and exemptions to a small class of citizenry—even in the labor world.

The Bolsheviki may by *boutez en avant*, *firman*, *hatti-humayun*, *hukm*, *mot d'ordre*, ordinance, *senatus consultum*, *ukase*,—or by whatever outlandish name the outlandish acts and practices are known and designated in the benighted, miserable and ignorance-ridden country. They may "communize" or "nationalize" wealth and women, but that does not prevent the poor oppressed people from thereby being pauperized and starved by the hundreds of thousands, nor the issue from being bastardized!

The statute-books furnish no fruitful field for research in the investigation after those fundamentals which are to be the hand-maids of the law student through a brilliant and successful professional career. The novitiate can have recourse to court decisions, someone remarks. Yes and no. It all depends,—upon who made the decision and who wrote the opinion; what was his character and capacities, his accomplishments in the law, and what his *motif* was. Unfortunately, it is not all adorners of the "wool-sack" who have the acquirements requisite for writing legal decisions. If the individual possesses the acquirements, he may not have the "judicial temperament"; without the "judicial temperament" no judge is able to write "good" opinions, and if he has the "judicial temperament" he may still be lacking in that essential quality of mind to see the cause in "perspective", that is, in the niche in the framework of the law where it belongs,—and on that account will "bungle" by reason of his failure to clearly set forth the reasons for the decision on fundamental principles. Fundamental principles lie at the foundation of every right-decision of a cause, even in those cases in which it turns upon conflicting evidence, merely. It must be remembered that the judge upon the bench is not other or different



from, nor greater or more learned, than was the lawyer at the Bar before his elevation to the Bench; having the same attainments and no greater mastery of fundamental principles; the same moral character and dependability, and no worthier; the same clearness of perception and happy faculty of calling to his aid and applying, the appropriate legal principles which do, or should, rule the decision to be written. Disinterestedness on the part of the judge is essential to proper determination of issues presented. The scales of justice must be held with equanimity and impartiality. The judge must never "take sides",—otherwise the opinion he writes will be "biased" and worthless. Sterlingness of character, dependability and rectitude of conduct, adherence to the traditions and fundamentals of our system of government, with no narrowness of vision and no preconceived opinions which are not grounded upon a thorough mastery of fundamental principles of the law; no party prejudices to be advocated; no religious creed-convictions to be boosted into prominence; no friends to be rewarded and no foes to be punished; unswerving loyalty to the constitution as paramount to all other considerations, whole-hearted espousal of our form of government and procedural system—these form some of the indispensable qualities which go to make up a good and a worthy judge, and to the writing of able, dependable and worth-while opinions from which the novitiate can laboriously cull at first hand some of the elementary and fundamental principles of our system of law and judicature.

It is much to be regretted that the judges upon the Bench do not all measure up to the requirements of the position which they occupy; in fact few of them measure up to the full height of those requirements, any more than all the lawyers at the Bar—from whom the judges are drawn—are able, honest, learned, upright, and worthy men. In too many instances the position is not won by merit but the selection is made from favoritism, partiality, service of party interests in the past, or willingness to favor and serve "big business" or vicious interests seeking advantages and preferments the law does not confer.

This is the reason why the vast reservoir of decisions does not furnish a reliable mine from which correct fundamental principles can be readily garnered by the novitiate—or by any one else, for that matter. Many of the opinions written are worthless as gauges by which to measure rights or redress wrongs; decide nothing aside from determining the cause presented—and in far too many instances the causes are not decided rightly; the opinions are mere words, words,—pronunciamentos from the Bench, acquiring character and dignity through the fact that those who have been selected to deliver them are

the servants of the people in the discharge of certain important tasks, raised to a temporary position of dignity and importance, and not otherwise—and they are not held to a sufficient accountability for their stewardship, or the manner in which they discharge those important functions and duties.

Legal decisions, although written opinions of judges, are not the law of the land. They are merely instances of the application of the law—wise or otherwise. A court decision is not to be made a *fetich* before which all must bow with bared heads; it is something to be weighed in the balance of fundamentals and appraised at its true worth, much as a lapidary appraises a proffered gem and pronounces it a stone with true fire, or denounces it as paste and worthless. In those instances, only, in which a “decision” carries the verities of the law, is it to be heeded and respected. Some “decisions” are not only not law, but are violative of every known principle of law. A dictum in an early California decision, which ruthlessly laid violent hands upon every known principle of law, has been made the basis of one of the prominent rules of decision by the courts of that state because, forsooth, it was an ignorant procunciamiento from the Supreme Bench! Then, again, there are the long lines of conflicting decisions upon identically the same questions, under substantially the same state of facts, which are diametrically opposed to each other. Both of these lines of decisions cannot be right. One or the other is fundamentally wrong. The two streams of decision in each instance should be traced to their sources, and that line of decision founded upon a false dictum, ignorance of the fundamental principles governing, a misapprehension of the doctrine in the case relied upon, or pervaded by a *motiff* that does not square with the judicial position and stewardship, should be revised and corrected—totally wiped out. An erroneous decision is not to be followed simply because it has been proclaimed from the Bench; it is to be corrected on the very first opportunity, if the fountain of our law is to remain pure and uncontaminated. There is nothing in our procedure that so makes for confusion or fundamental principles and for bad law, as the rule for the decision of causes known as *stare decisis*—follow a decision because it has been made, without regard to its merit or conformity to fundamental principles! In the interest of correct law, the administration of appropriate and exact justice, and the maintenance of wholesome principles of law, this rule of practice sanctioned by appellate courts should be abolished. To err is human,—even in judges,—an error is to be expected; but it is silly to contend that because we have erred once we must continue erring in the same matter to the end of our lives. Let judges “reform” and correct this erroneous and monstrous procedure.

I am not oblivious to the fact that a well-known professor of law in an eastern law school conceived the notion that there was no law save that which is embalmed in a court decision, and that all written decisions of appellate courts are law. This is fundamental error, disclosing a narrow and unenlightened vision. But the error is not more fundamental, and not so pernicious, as some of the theories and propaganda promulgated by crack-brained eastern professors through that red rag, "The New Republic," and its satellites, the prostituted "Nation" and the bedeviled "Dial!" Professor Langrell's suggestion fell upon fertile soil, and those in charge of the various law schools in the country "fell" to the fallacy and adopted the fad, with the result that the law-schools of the nation have switched from the commendable and wholesome practice of teaching the fundamentals of the law, to an adoption of the "case system", as a means of preparing young men for entering the profession, with the result that the land has been filled—not with lawyers but with "case-chasers." If there are any eminent and learned lawyers of the recent generation of lawyers,—among those who have been called to the Bar since the case-system came into vogue,—they are not such because of the training received under that system, but in spite of that system.

Turning the student loose in the brontasaurial sea of conflicting decisions of the courts is comparable only to the folly of setting a mariner out upon a fog-bound, rock-interspersed, storm-tossed ocean without chart, compass, or rudder; the two malicious experiments bear a close analogy, and they eventuate in like disastrous results. Few of the decisions in the wilderness of "judicial deliverance" are law today. Our law reports, and the digests of those reports, are full of "dead wood" which should be lopped off, in the interest of the law itself and to lessen the labors of the Bench and Bar; much as the dead wood of a fruit tree is pruned away in the interest of future growth and productiveness, and a dead limb of the human body is amputated for the preservation and promotion of a healthy condition.

Many of those decisions are as dead as *Brontasaurus* of the dinosaurian con, with the same diminutive brain cavity, and a like ponderosity of "dead weight" with the fossil lizard in the balmy days of its corporial rotundity and twenty-tons *avoids*. Is it the part of wisdom to expect the student, as yet ignorant of all legal principles, to successfully navigate this *Dead Sea of decision*—even with an experienced guide—and to make his entry into the Hall of Themis in presentable shape, with a full mastery of those fundamentals which will equip him worthily for a seat in that Hall, and make him a safe "practitioner"

to whom the legally sick can safely resort and in him confide the conservation of their rights and the redress of their wrongs?

The student may possibly "master" some few of the multitude of cases, and even if fate-favored in the matter of selecting for mastering those cases only which are really law today, this does not give him a grasp of the underlying principle ruling the case he has "mastered," or supply him with the reasons for that rule; and his learning will not stand him in hand, and will serve him no useful purpose, unless the future cause he has undertaken is one on "all fours" with the "case" he has "mastered." The consequence is that when the case-system novitiate comes to the Bar, in searching for authorities with which to bolster his argument, and fortify his position, he looks for a case on "all fours" with the cause he has in hand, instead of analyzing the facts of his cause and calling to his aid the fundamental principle by which its proper determination must be governed, and then gathering the decisions applying that fundamental principle in the particular angle in which his cause falls. I can name you the names of case-system judges upon the Bench who dare not venture to decide a simple motion or determine an ordinary demurrer unless supplied with a "case in point",—and that means a decision in a cause "on all fours."

A dean in a case-system law-school in the east, and a dean in a similar law-school nestling in the eastern edge of the Rocky Mountains, are much perturbed, and are calling for a "new appraisalment of the law" and the formation of a new rule of law, because, forsooth, they have met with something not on "all fours" with anything in the reported cases of old. The cause of all this worry and anxiety and trepidation is the new situation or "complex" arising where the owner of an automobile allows another to drive the machine for the latter's pleasure or profit, and through negligence or unskillful handling of the machine, damage or death results to a third person, and the resultant quandary: Is the owner of the automobile liable? Is this in fact a new "complex" not provided for by well-established fundamental principles? Does it require the formulation of a new rule to enable the courts to dispense exact justice? Is an automobile in a different class from that of any other "dangerous animal," and are not the well-known rules applicable to ferocious bulls and vicious dogs equally applicable to homicidal automobiles? Is there any occasion for the worriment because the "dangerous animal" happens to be an automobile instead of a camel, bull, or a dog? Measuring them by their actions and rulings one would conclude that petty judges think so, by reason of their persistent refusal to enforce well-known principles of law and statutes expressly made to "fit the crime," when an automobile

is the offending instrument. But the fundamentals of the law are not to be measured by the short-comings of judges who administer their ideas of what the law should be and not what the law—fundamental or statutory,—really is and calls for. Is there any justifying reason, or common sense, even, in punishing for manslaughter a man who carelessly discharges a firearm and wounds or kills another, and turning loose scott-free one accused of maiming or killing, carelessly or wantonly, a human being, simply because the instrument used in inflicting the injury is an automobile?

The elder generation of lawyers “fixed the law” by a different and preferable method, leading to broader and higher results. Their’s was a mastery of principles of the law; of the fundamental principles underlying all rightly-decided cases. They not only mastered these principles as they had previously mastered the rulings of arithmetic, but they also learned the reasons for the rules of the law, the same as they had been taught the reasons for the rules of arithmetic. By mastering these rules of the law step by step, as they had previously mastered the rules of arithmetic step by step, they were able to mount to the higher rungs of the ladder of the law, for the same reason that they were able to achieve success in mathematics—through fundamental ground work.

What would be thought of the preceptor who “teaches the young idea how to shoot” seeking to have his tousle-headed pupils in the primary grades formulate appropriate rules and solve intricate mathematical problems by setting before them an unassorted array of meaningless, to him, figures! Or what wisdom of such a preceptor who should assign to the beginner the mastery of logarithms, before he had been taught the simple rule of three! The law is a complete structure under all the known systems of law,—the Egyptian Law, the Hindu Law, the Civil Law, the Common Law,—and to be worthily attained must be studied systematically and mastered in detail by progressive steps. The student should be taught the elementary principles underlying all law before he is set to the formulating of rules of law from decided cases, or assigned the task of mastering the complicated inter-related questions of law. The student cannot reasonably be expected to satisfactorily accomplish his purpose and attain rounded knowledge and proficiency in the law by sailing a sea of derelict decisions merely, although he may encounter on the way and take aboard some really worth-while cases during his cruise.

The elder generation of lawyers did not travel an unknown and dangerous deep, but pursued a broad and well-beaten roadway leading to a comprehensive goal. Their acquirements were not a disjointed conception derived from perusal “decisions” which had cost some judge

a few hours, or at most a few days, only, of study and meditation, before proclaiming his decision; they had for leaders and guides and guards men of genius, endowed with analytic minds, painstaking industry, who, after a life time, perhaps, devoted to study and preparation, furnished clear and comprehensive statements of the rules applicable in a selected branch of the law, together with the reasons for those rules, and the exceptions and limitations and qualifications of the rules, as well as their standing and relative potency in inter-related situations in which modifying and qualifying conditions called for the application of more than a single fundamental principle. The student,—or the lawyer, for that matter,—who did not know the reason for the rule of law, together with its exceptions, limitations, and qualifications was not supposed to and did not know the law, when the elder generation of lawyers studied the law; and the same is true today.

In pursuing their set task the elder generation of lawyers, in their student-days, were required to read a designated amount of a treatise upon the selected topic of the law, prepared by able lawyers who had devoted years of mature manhood to formulation and elucidation of the rules, the reasons for the rules, together with the exceptions, limitations and qualifications of the rules, of that particular branch of the law and when the daily task was accomplished, they were required to shut up the book and to write out on paper, in terse terms, the substance of that which they had read, omitting nothing vital either of rules, reasons for rules, exceptions, limitations, or qualifications. They were then examined upon the manuscript reproduction of what they had read. If their performance in this regard was satisfactory to their preceptor, a new task was assigned and a new reproduction of rules, etc., was prepared; if the summary was not satisfactory, the task was required to be re-gone over, with more attention and concentration, until it was thoroughly mastered. This method of procedure was followed in each succeeding topic of the law—structure the student was required to master to entitle him to a license to practice; and when completed he had a fair comprehension of the more general principles of the rules of law, and when he passed successfully his examination and had won his “sheepskin,” he was admonished that he was then prepared to commence the study and mastery of the law with the tutelage, reminded that his student-days were only just begun, informed that only assiduous and unremitting application through his professional career would enable him to attain an acceptable mastery of the law and a deserved eminence in his profession.

Having thus “fixed the law” in his mind, the young lawyer of the elder generation was confronted with the task of “finding the law”,—

that is, of finding the decisions applying to causes by decision—a particular principle or fundamental rule,—in his practice. His recourse in those days was to the digest of the reports in the state in which he “hung out his shingle,”—if there was a digest; and when he asked himself: “What have the courts decided,” in the field of national decision, his only recourse was to the United States Digest, both the old and the new series of that work,—incomplete as it was in extent, and inconvenient as it was in use. Digesting was then in the infancy of the “art” in this country, and was formulated along different lines from those that are found in the digests of today. The classification of the law then, founded upon the classifications of the law formulated by Lord Hale and Sir William Blackstone, while logical, was synthetic as contradistinguished from analytic. The original system of digesting found in the United States Digest was improved upon by J. E. Hudson, Fred Williams, J. H. Mallory, and Benjamin Vaughn Abbot,—but was never entirely satisfactory, although that digest was, in its prime days, the most popular and useful set of books in the lawyer’s library.

When the West Publishing Company purchased from Little, Brown & Company the copyright interest to the United States Digest, both the old and the new series, some time prior to 1907, an entirely new scheme of classification was worked out by Mr. John H. Mallory, but was founded upon the general scheme of the United States Digest, modified by making the scheme more analytical and topical. This scheme of digesting was approved by the American Bar Association, has become known as American System of Digesting and has been adopted, to a greater or less extent, by all digesters in this country in recent years, so far as the copyright interests will permit. Changes and improvements have been made on this improved system of classification and digesting from time to time, but it is not yet perfect or completely satisfactory. One of the great faults with which the scheme of the system is charged, is that it is too arbitrary and iron-clad; is not sufficiently analytic, pliable and versatile, or sufficiently “topical” to meet the demands of modern times. While it has tended to give “aid and comfort” to the case-system, yet the case-system,—being destructive of all synthetic conceptions of the law, and simply teaching by rote “cases” only, such cases of necessity dealing with “topics” rather than applying general synthetic principles of the law,—has become the greatest caviler at the American System of Digest. The reason is because the students of the case-system and the lawyers “graduated” from the case-system law-schools, knowing this or that case or line of cases, only, which are of necessity topical and not analytical in principle or synthetic in scope, the result is that a system of classification more topical, in the decisions will be gathered under topical heads

rather than logical anathetic or synthetic heads, is being urgently demanded. That is, case-system lawyers want a topical index and not a logical digest.

To meet this demand of the case-system attorneys, enterprising law publishers, have been casting about to formulate a plan by which the want can be sufficiently satisfied. "The Common-Sense Index," devised by the editorial staff of the Callaghan Law Book House was the first in the field. This work being,—like the original inorganic nebulae, "with form",—is ample to meet the demands of the most unscientific minds and the wants of the most unskillful and untrained lawyer. There is no pretension at any logical analysis or classification of any kind. The work is purely topical and "wordal." Not only every topic of the law is covered, but also every word under which it can be conceived an ignoramus might look. It goes without saying that the "digest", or "index", is immensely popular, financially successful, and, from a business standpoint, justifies the publisher in copyrighting the system of "digest."

Other equally enterprising publishers have been laboring in the same field, seeking to attain the same end, with more commendable results,—at least from the authorial standpoint, if not from that of actual utility to the more unpretentious in the legal profession. Mr. Joseph A. Hill, for the last twenty years or more has been in charge of the digesting work of the Lawyers' Co-operative Publishing Company,—and the increasing excellence and serviceableness of the successive digest brought out by that publishing house are mile-stones marking the author's progress in the gentle art of digesting; an art that drives many men daffy when long pursued,—as the West Publishing Company have found in the preparation and publication of their monumental and indispensable works along that line.

Mr. Hill is responsible for the latest venture in the field of digesting, in the "Complete L. R. A. Digest,"—and one who has examined the work, as far as the four volumes published, cannot but regret that the scope of the work was not extended so as to include the whole of that excellent body of live decisions constituting the American Selected and Annotated Cases System, instead of being confined to the L. R. A. alone. Had the scope been thus broadened the publishers would have laid the profession under undying gratitude, would have made available, under one system of classification and one alphabet, the great body of live American case-law, and have gone far toward removing the evils and the labor occasioned by "The Dead Sea of Decisions". This digest is builded on new and novel lines which cannot be but helpful and popular. It is not a radical breaking away from former systems of digesting, as is the "Common Sense Index." It is



at once logical and topical—strange as the melting of the two productions may seem without examination of the work itself. All the logical and standard topics or heads of the law and retained in the digest-matter proper, with fine analytic sub-divisions,—it eschews the synthetic system, which drags in under one general head all related subordinate subjects,—so that in the final analysis each subdivision represents but one point, or if the point has two or more phases, one phase of the point, with the result that all the decisions collected under the head are directly upon that point alone, and not part of them upon a cognate or a closely-related point. In these days of “precedent” hunting for a case on “all fours”, this arrangement will be a great time-saver to the busy attorney. One of the drawbacks to the American System of Digesting is the fact that the sub-divisions are not, in many instances, carried sufficiently far to give a final differentiated point; but the truncated column of analysis embraces within its blunted end two or more final points, or phases of final points, so that the searcher for a given final point, or phase of a final point, is required to examine and discard the cases collected which do not deal with his point, or phase of a point, in order to get all the cases which do deal with that point. In the Complete L. R. A. Digest all this work of examination and discarding is done for the user by the editor and his personally-trained assistants, and in this is accomplished a great saving of time and labor to the practitioners. Instances innumerable could be cited, but they all stand revealed on slight examination; comparison and parallels could be drawn, but “comparisons are odious” and are not necessary in this instance, the facts are apparent upon the face of the work. Some idea, however, of the extent to which the final-point subdivision in the analysis has been carried may be gained by noting that under the first main division of the title “Action or Suit,” the first subdivision has nine such heads, with no corresponding head in the only competitor to this digest; under the second sub-division there are fifteen heads, to two elsewhere, under the third sub-division six heads, to two elsewhere, and a like condition obtains to the end of the title,—and indeed throughout all the titles in the four volumes so far issued. Another commendable feature of the work, and one which will greatly appeal to all users, is the wealth of cross-reference matter distributed at the head of each subject, and “hung” on words or detached propositions of law properly finding a place in the digest under some other title, which are scattered throughout the four volumes already issued. In all these black-lettered cross-references the searcher is cited to the exact spot,—by title, section and paragraph,—where the matter referred to will be found treated; thus accomplishing the commendable, helpful and popular feature of the “Common Sense Index,” and of that

other excellent lawyers' working-tool, the "Descriptive-Word Index to the Decennial Digests", gotten out by the West Publishing Company, and which has proved so helpful in enabling the users to turn to the exact paragraph in their system of digests wherein the matter wanted will be found gathered. The publisher announces that in the final volume of the set, Volume 10, will be collected under one alphabet all these black-lettered cross-references, which will furnish a complete "Word Index", and will doubtless have for the present digest all the helpful advantages of the "Descriptive Word Index" of the West Publishing Company furnished for the digests which that company put out.

There are many other helpful and commendable features to which attention could be called, but I have space remaining for but one more. A slight examination has shown, and will show to the experienced searcher, that this new digest is not simply a rehash and consolidation of the various digests heretofore gotten out for the L. R. A. system of selected and annotated cases; but that the digest paragraphs themselves are new and have been made practically uniform in length, as nearly as the subjects have permitted; the style adopted being as concise as is consistent with bringing out the point clearly. A little further examination and comparison convinces the writer that to be able to accomplish this the editor has been at the pains and labor of re-reading the entire body of live case laws contained in the three series of L. R. A. Many new points are found to be introduced which were not in either of the former successive digests issued for that series; and the number of paragraphs upon any given topics is found to be greatly increased, if not doubled; this fully demonstrates that the new reading was much "closer" than the hurried original reading.

It is plainly manifest that on this re-reading attention was also paid to dicta and reasoning of courts, in arriving at their conclusions and decisions; some attention, at least, is also put to the historical development of the law, and the information gathered is made accessible by being scattered at the appropriate places throughout the volumes, preserved permanently to the lawyers who would otherwise have no possible means of locating the matter,—even what they know of its existence. As an illustration of this last feature of the work reference may be made to paragraph "a", under section 2, on page 28, of Volume I, which reads:

"Historical review and discussion of the question whether the payment and acceptance of a sum less than the amount due in full discharge and satisfaction of the debt is a defense to the collection of the balance.—*Frye v. Hubbell*, 17 L. R. A. (N. S.), 1197, 74 N. H. 358, 68 Atl. 325."

# DEMOCRACY VS. LAW

By Hon. Charles E. Chidsey, of the Mississippi Bar

That the proposal recently made by the American Bar Association that in the future a higher standard of education than now exists, be required of all applicants for admission to the Bar, opens a wide field for discussion, as it is most radical in its departure, for it would

"Bid time return,  
Call back yesterday,"

and strike at the prime dogma of democracy; social as well as political equality. Until Democratic America set the pace of dragging all things down to a common level, it was most uncommon to find a member of the Bar who had not received a classical education. The title of "Barrister at Law" bore with it the guarantee that its owner was not alone learned in the law but was also a man of culture.

The Bar of Rome gave to the world such men of letters as Livy, Cicero, the two Plinys,—men who have an almost measureless influence of the thought of the ages that followed them; indeed, it would not be an exaggeration to say that their influence has been almost as great as that of the sacred writers. Throughout the Middle Ages and until the English Revolution of 1640, to be able to read and write and speak Latin was a condition sine qua non for all professional men, for all statutes, judicial and scientific literature was in the Latin or French tongues and Latin was the language of diplomacy up to the time of the restoration of Charles II; and among the educated class the use of Latin in writing and conversation was almost as common as the vernacular. Milton, we are told, even contemplated writing "Paradise Lost" in Latin, for the thought that if written in the vulgar tongue it would be lost to posterity. Hugo Grotius, who today is known to lawyers (?) as the author of the treatise "De Jure Bello et Pace," made an elegant translation into Latin verse of The Greek Anthologia and his version of Meleager's Hymn, "Plecto leukoion" (I weave white violets.)

*"Plectam ego narcissam, plectam Cytherea myrta,  
Alba formosa lilia cum violis;  
cumque croci foliis Hyacinthum suave rubentem."*

(I'll wreath the white violets—with myrtle shade  
Bind soft narcissus, and amidst them braid  
The laughing lily; with whose virgin hue  
Shall blend bright crocus and the hyacinth blue.

Merivale.)

and also that of "Rouphinou" (Rufinus.)

*"Floribus e pulchris mitto tibi, pulchra, coronam.  
composui manibus quam Rhodoclea meis."*

(This crown of fairest flowers, my Rhodoclea,  
By my own fingers wreathed, I send to thee.

Hay (1)

These two fragments of his Latin poems are sufficient to justify his claim to being a poet and refute the common opinion that the courtship of the muses and intellectual culture by a law are an evidence of intellectual weakness. (2)

(1) I would gladly quote these gems from the Anthologia in their entirety, but a line or two is all that space will permit. I cannot give the Greek text as THE LAWYER AND BANKER has no font of Greek type, and then for a Mississippi lawyer to confess familiarity with Greek and Latin is to place him in danger of the judgment for heresy and as an enemy of democracy.

(2) One may think that this drawing is pretty strong, but as some years ago a prominent official in a Protestant Church expressed his surprise and marked disapproval when he learned that I had been studying some of Bach's Fugues, such studies, he giving me to understand, were unbecoming a lawyer.

This love of classical literature and language was not lost among public men until within the last half century, and I have before me selections from the *Anthologia Oxiensis* of 1846, which is a collection of Latin verses by Oxoniens, and I select as being best known to Americans of the present generation Goldwin Smith who therein appears as a translator of Gray's "Elegy, written in a Country Churchyard," and the verses:

*"Interdum at que hedera vestile e culmine turris  
Ad lunam auditur noctua moesta queri;  
Secretis si quis propius penetralibus errans  
Rumpat inaccessae jura vetusta domis"*

is his rendering of:—

*"Save from that yonder ivy-mantled tower  
The moping owl does to the moon complain  
Of such as, wand'ring near her secret bower,  
Molest her ancient solitary reign."*

Then again the beautiful lyric of Coleridge, beginning:

*"As late each flower that sweetest blows  
I plucked, the garden's pride!  
Within the petals of a rose  
A sleeping love I spied."*

is by Goldwin Smith rendered:

*"Dum, quocunque viget copia narium,  
Horti delicias persequor, in rosa  
Nuper flore jacentem  
Vidi forte dupidinem."*

Goldwin Smith died only a few years ago, and in his day he was one of the foremost publicists of his time, and his writings were always free from any taint of moral or political demagoguery.

These quotations have been given to show that the law as erstwhile based upon an aristocracy of learning and talent, and that the possession of classical culture is not a drag upon talent. One would think from the hysteria of "great editors" that John Marshall became a great jurist and Abraham Lincoln a great statesman because they had not had a liberal education. These men became great in spite of their want of education, because they had that indefinable something we call "genius;" their genius making them able to overcome all difficulties. Little minds see their want of education, but are incapable of understanding their genius.

James Kent and Joseph Story, who did so much to shape the course of American Jurisprudence and constitutional law, until within a few decades hence, were both classical scholars, their works bristling with quotations from the Roman and French civil law writers and classical authors, and it was my fortune to learn jurisprudence from and to become obsessed with their ideals of a bench and bar.

The movement against educated men at the Bar and in the Forum may be dated from the French Revolution and its Dogmas of "Liberty, Fraternity and Equality," for the mad passion to bring all things to a common level began its epidemical career in Paris in 1789 and soon found congenial soil in America, where it has grown until it promises to overthrow the national government. This tendency of democracy to destroy everything related to the past became noticeable in America shortly after the American Revolution.

William Hamilton, an English novelist and military historian, author of the then well known novel, "Cyril Thornton," in his book "Men and Manners in America," (William Blackwood, Edinburgh 1832) gives some interesting observations of America in 1830, from which I will quote quite extensively and

without any apologies for so doing, as what he says may be—by changing the date of 1830 to 1922—be taken as a correct account of the social, political life of the United States, inasmuch as what he says then exists today and in as an acute a form.

"One fact is confessed by all parties," he says, "that the progress of democratic principles from the period of the Revolution has been very great. During my whole residence in the United States, I conversed with no enlightened American who did not confess *that the Constitution—though the same in letter as when established in 1789—is essentially different in spirit.* It was undoubtedly the wish of Washington and Hamilton to counterpoise as much as circumstances would permit, the rashness of democracy by the caution and wisdom of aristocracy, of intelligence and wealth. There is now no attempt at counterpoise. The weight is all on one scale, and how low by continual increase of pressure it is yet to descend would require a prophet of some sagacity to foretell. I shall state a few circumstances which may illustrate the progress and tendency of opinion among the people of New York.

"In that city a separation is rapidly taking place between the different orders of society. The operative class have already formed themselves into a society under the name of 'The Workers,' in direct opposition to those who, more favored by nature or fortune, enjoy the luxuries of life without the necessity of manual labor. These people make no secret of their demands. They are published in the newspapers and may be read on half of the walls of New York. Their first postulate is EQUAL AND UNIVERSAL EDUCATION, 'It is false,' they say, 'to maintain that there is at present no privileged order, no practical aristocracy in a country where distinctions of education are permitted. There does exist an aristocracy of the most odious kind—an aristocracy of knowledge, education and refinement, which is inconsistent with true democratic principles of absolute equality.' They pledge themselves, therefore, to exert every effort, mental and physical, for the righting of the flagrant injustice. They proclaim it to the world as a nuisance which must be abated before the freedom of an American be something more than a mere empty boast. They solemnly declare that they will not rest satisfied till every citizen of the United States shall receive the same degree of education and start fair in the competition for the honors and offices of the State." (3)

It will be, perhaps, said in reply that such democratic intolerance toward a higher education no longer exists in the United States, and that the public is inclined to take a broader view of the subject. Those that hold to such an opinion are walking in the darkness of self imposed blindness. On the tenth day of March 1922, one of the most widely circulated and influential prohibition papers in the South, in a leading editorial emphatically opposed the plan of the American Bar Association for a higher standard of education for members of the profession, and practically used the same argument as is quoted by Hamilton, that it was intended through the means of education to create odious class distinctions and cut off the poor country boy from an equal opportunity of advancing at the Bar and in public life with the "city chap" and urged the citizens to resist the proposed innovation. One would think that the editor had copied from Hamilton's "Men and Manners in America," but this is hardly probable. Having the same type of mind and the same sentiments as the democrats that Hamilton speaks of, the editor naturally used the same language and phraseology. A few days later the same journal in a leading editorial upon the same subject, quoted with approval the words of "a brilliant young Tennessean" who said: "I would rather have my boy in heaven learning his A B C than in hell reading Latin and Greek," a phrase that readily found its way into congressional demagoguery.

(3) In the quotation from Hamilton, the capitalization is his own and the italics mine.

"It is of course impossible," continues Hamilton, "and these men know it, to so educate the laboring classes to the standard of the richer; it is their professed object to reduce the latter to the same mental condition with the former; to prohibit all superogatory knowledge; to have a maximum of acquirement, beyond which it shall be punishable to go."

This is the democratic spirit as we find it everywhere; if it cannot ascend the mountain, the mountain must be levelled with the plain.

"But those who limit their views," continues our author, "to the mental degradation of their country, are in fact the MODERATES of the party." There are others who go still farther, and boldly advocate the introduction of an AGRARIAN LAW, and a periodical division of property. These unquestionably constitute the extreme gauche of the WORKY PARLIAMENT, but still they only follow out the principles of their less violent neighbors, and eloquently dilate on the justice and propriety of every individual being equally supplied with food and clothing; on the monstrous iniquity of one man riding in his carriage while another walks on foot, and after his drive enjoying a bottle of champagne, while many of his neighbors are shamefully compelled to be content with the pure element. "Only equalize property," they say, "and neither would drink champagne or water, but both would have brandy, a consummation worthy of centuries of struggle to attain."

All this is nonsense, undoubtedly, nor do I say that this party is yet so numerous or so widely diffused as to create immediate alarm. In the elections, however, for the civic offices of the city, their influence is strongly felt, and there can be no doubt that as population becomes more dense and the supply of labor shall equal or exceed the demand for it, the strength of this party must be enormously augmented. Their ranks will always be recruited by the needy, the idle and the profligate; and like a rolling snow ball, it will gather strength and volume as it proceeds, until at length it comes down thundering with the force and desolation of an avalanche.

"Whenever increase of population shall have reduced the price of labor to a par with that of other countries, these advantages will come into full play; the United States will then meet England on fair terms in every market of the world, and probably attain unquestionable superiority. Huge manufacturing cities will spring up in various quarters of the Union, the population will congregate in masses, and all the vices incident to such a condition of society will attain speedy maturity. Millions of men will depend for substance on the demand for a particular manufacture, and yet this demand will of necessity be liable to perpetual fluctuation. When the pendulum vibrates in one direction, there will be an influx of wealth and prosperity; when it vibrates in the other, misery, discontent and turbulence will spread through the land. A change of fashion, war, the glut of the foreign market, a thousand unforeseen and inevitable accidents, are liable to produce this, and deprive multitudes of bread who but a month before were enjoying the comforts of life. Let it be remembered that in this suffering class will be practically deposited the whole political power of the State; that there can be no military force to maintain civil order, and to protect property; and to what quarter, I shall be glad to know, are the rich to look for security, either in person or in fortune.

"There will be no occasion, however, for convulsion or violence. The WORKY convention will only have to chose representatives of their own principles in order to accomplish a general system of spoliation in the most legal and constitutional manner. It is not even necessary that a majority of the Federal Legislature should concur in this. It is competent to the government of each State to dispose of the property within their own limits as they think proper, and whenever a numerical majority of the people shall be in favor of an AGRARIAN LAW, there exists no counteracting influence to prevent, or even to retard its adoption.

"At present the United States is perhaps more safe from revolutionary

contention than any other country in the world. But the safety consists in one circumstance only. The great majority of people are possessed of property. The truth is undeniable, that as population increases another state of things must necessarily arise, and one unfortunately never dreamt of in the philosophy of the American legislators. The majority of people will then consist of men, without property of any kind, subject to the immediate pressure of want, and will be decided the great struggle between property and numbers; on the one side hunger, rapacity and physical power; reason, justice and helplessness on the other. The weapons of this fearful contest are already forged; the hands will soon be borne that are to wield them. At all events, let no man appeal to the stability of the American government as being established by experience till this trial has been made.

"After much, and I hope impartial and certainly patient observation, it does appear to me that universal suffrage is the rock on which American freedom is most like to suffer shipwreck. \* \* \* American legislations—\* \* \* seeing no immediate danger in the utmost extent of suffrage, were content to remain blind to the future. They took every precaution that the rights of the poor man should not be encroached upon by the rich, but never contemplated the possibility that the rights of the latter might be violated by the former. American protection, like Irish reciprocity, was all on one side. It was withheld where most needed: it was profusely lavished where there was risk of danger. They put a sword in the hand of one combatant, and took the shield from the arm of the other. \*

\* \* \* To an American of talent, there exists no object to stimulate political ambition, save the higher offices of the Federal Government, or of the individual states. The latter, indeed, are chiefly valued for the increased facilities they afford for the attainment of the former. Acquisition of any sort, therefore, the great mass of the people do not value, or are incapable of appreciating—are of no practical advantage, for they bring with them neither fame nor substantial reward. But this is understating the case. Such knowledge if displayed at all, would not merely be a dead letter in the qualification of a candidate for political power, it would interpose a decided obstacle to his success. The sovereign people of America are given to be somewhat intolerant of acquisitions, the immediate utility of which they cannot appreciate, but which they do feel has imparted something of a mental superiority to its possessors. This is particularly the case with regard to literary accomplishments. The cry of the people is for 'equal and universal education; and attainments to which circumstances have placed beyond their reach, they would willingly discountenance in others. \* \* \* The people have no objection to a clever surgeon or a learned physician, because they profit by their skill. An ingenious mechanic they respect. There is a fair field for a chemist or engineer. But in regard to literature, they can discover no practical benefit of which it is productive. In their eyes, it is a mere appendage of aristocracy, and whatever mental superiority it is felt to confer, is at the expense of self esteem of the less educated man. I have myself heard in Congress the imputation of scholarship bandied as a reproach and if the epithet of 'literary gentleman' may be considered as malignant (4) there assuredly existed ample apology for the indignant feeling it appeared to excite. The truth, I believe, is that in their political representatives the people demand just so much knowledge and accomplishments as they conceive practically available for the promotion of their own interest. More would gild refined gold and paint the lily, operations which would add nothing to the value of the metal or the fragrance of the flower."

"We have only to change the date of the foregoing extract from Hamilton's work from 1830 to 1922 and it will be a complete resume of the conditions that exist today. Almost every day we are meeting with evidence that justifies the gloomy forecast of Hamilton of the evils that will flow from universal suffrage and the increase of Democratic power. This mania for reducing all things to a common level has been frequently and only lately in a promi-

(4) See note 3.

ment magazine been ascribed to the teachings of J. J. Rousseau, whose philosophy made possible the first French Revolution, and which form the basis of all revolutionary propaganda of today.

Rousseau merely divorced communism from Christian theology and made it a dogma of atheism and a weapon to attack sacerdotalism in all of its forms. Some two centuries before the appearance of the Contrat Social communism had been attempted on a large scale in Germany. "Social, economical and political causes bear a large part in the Reformation of the Sixteenth Century; and communism also had its representatives in the Ana-baptist of Munster, who under the leadership of Jan Matthys and John of Leyden, were for a time so formidable. 'Death to all priests and kings and nobles!' was their rallying cry, and—while preaching some extravagant theological doctrines, they waged an implacable war against all the rich. All of these were ordered on pain of death to deliver up their gold and silver for common consumption, and it was proclaimed that everything was to be common among those who had undergone the second baptism, and that meat and drink were to be provided at the common cost though each man was to continue to work at his own craft. *The movement, after devastating large districts in Germany and producing terrible crimes at last perished in fire and blood.* A few years later the theological doctrines of the Ana-baptist spread widely, but the communistic side of their teaching died rapidly away." (5)

In the Sixteenth Century the revolutionist made war upon the priests because they were of the Roman Hierarchy and in the Eighteenth and Nineteenth and Twentieth Centuries the revolutionists directed their attacks upon priests and ministers alike, regardless of whether they were Protestant or Catholic, and in each case the underlying cause was the same. There was in each country where a revolution broke out a union of church and state and the state was under the domination of ecclesiasts and the revolutionists could or would not differentiate between the clerics who belonged to the dominant church party and those who did not. (6)

The Democracy of America, as seen by Hamilton, and as it exists today, is theological in its concept and is dominated by ecclesiasticism, which today—as it did in the centuries past—is directing its efforts to secure first control of the legislative bodies, then of the courts, and this is the last step in political and social anarchy.

Bulwer in his very able work, "Athens—Its Rise and Fall" (7) gives a most graphic account of the manner in which the mob seeks and holds control of the judiciary and of the evils that follow it.

"A yet more pernicious evil", he writes, "If the social state of the Athenians was radical in their constitution—it was their courts of justice. Proceeding upon a theory that must have seemed specious and plausible to an inexperienced and infant republic, Solon laid down as a principle of his code, that all men were interested in the preservation of law, so all men might exert the privilege of the plaintiff and accuser. As society grew more complicated, the door was thus opened to every species of vexatious charge and frivolous litigation. *The common informer became a most harassing and*

(5) *idem.* See Banke's History of the Reformation in Germany, III. 583-610. Democracy and Liberty by W. H. Lecky, II. 236.

(6) In a future paper it is my purpose to give an historic outline of the anti-clerical mania that has manifested itself in all Revolutions and some considerations of its cause, this mania being one of the most amazing phenomenon of the history of humanity.

(7) The *Hellaea* is from the Greek "Hales or Halea" an assembly; the Greek Ecclesia.



*powerful personage, and made one of a fruitful and crowded profession; and in every capital of liberty there existed the worst species of espionage. But justice was not there facilitated. The informer was regarded with universal hatred and contempt; and it is easy to perceive from the writings of the great comic poet that the sympathies of the Athenian audience were, as those of the English public at this day, enlisted against the man who brought the inquisition of the law to the hearth of his neighbor.*

*"Solon committed a yet more fatal and incurable error when he carried the democratic principle into judicial tribunals. He evidently considered that the very strength and life of his constitution rested on the Heliæa (7) a court, the numbers and nature of which has already been described. Perhaps at a time when the old oligarchy was yet formidable, it might have been difficult to secure justice to the lower classes, while the judges were selected from the wealthier. But justice to all classes became a yet more capricious uncertainty when a court of law resembled a popular hustings.*

*"If we intrust a wide political suffrage to the people, the people at least will hold the trust for others than themselves and their posterity; they are not responsible to the public, for they are the public. But in law—where two parties are concerned, the plaintiff and the defendant, the judge should not only be incorruptible, but strictly responsible. In Athens the people became the judge, and in offenses punishable by fine, they were the very ones interested in procuring condemnation; the numbers of the juries prevented all responsibility, excused all abuses, and made them susceptible of the same shameless excesses that characterized self-elected corporations, from which appeal is idle, and over which the public opinion exercises no control. These numerous, ignorant and passionate assemblies, were liable at all times to the heat of party, to the eloquence of individuals, to the whims and caprices of a multitude orally addressed. It was evident also that from service in such a court, the wealthy and eminent and the learned with other occupations and amusements would soon seek to absent themselves. And the final blow to the integrity and respectability of the popular judicature was given at a later period by Pericles, when he instituted a salary—just sufficient to tempt the poor and to be disdained by the affluent—to every dikast or jurymen in the ten ordinary courts. Legal science became not the profession of the erudite and the laborious few, but the livelihood of the ignorant and the idle multitude. The canvassing, the cajoling, the bribery that resulted from this—the most vicious institution of the Athenian democracy, are but too evident and melancholy tokens of the imperfections of human wisdom. Life, property and character were at the hazard of a popular election. These evils must have been long in progressive operation; but perhaps they were scarcely visible till the fatal innovation of Pericle and the flagrant excess that ensued, allowed the people themselves to listen to the branding and terrible satire upon the popular judicature, which is still preserved to us in the comedy of Aristophanes.*

*"At the same time certain critics and historians have widely and grossly erred in supposing that these courts of the 'sovereign multitude' were partial to the poor, and hostile to the rich. All testimony proves that the fact was lamentably the reverse. The defendant was accustomed to engage persons of rank or influence whom he might number as his friends, to appear in court on his behalf. And property was employed to procure at the bar of justice the suffrage it could command at a political election. The greatest vice of the democratic Heliæa was, that by a fine the wealthy could purchase pardon; by interest the great could soften law. But the chances were against the poor man. To him litigation was indeed cheap, but justice dear. He had much the same inequality to struggle against in a suit with a powerful antagonist that he would have in contesting with him for an office in administration. In all trials resting upon the voice of popular assemblies, it ever has been and ever will be found that cæteris paribus, the Aristocrat will defeat the Plebeian."*

# INTERESTING BANKING DECISIONS

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## Words, Not Figures, Control

A note in the left-hand corner mentioned the sum of "\$9,060.00." The written portion of the note read "nine hounderd and sixty." The "h" was so written that it might possibly be m'staken for a "t."

The Supreme Court of Minnesota in *Bonn vs. Mertz*, 188 N. W. 262, held that the amount of the note is \$960.00. The court refers to the Negotiable Instrument Act, which contains the following provision: "Where the sum payable is expressed in words, and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount."

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## SAFE DEPOSIT COMPANY IS BAILEE FOR HIRE

In the case of *Trainer vs. Sanders*, 113 Atl. 678, the court held that the Sheriff, acting under a writ of execution, could compel the opening of a safe deposit box rented by the judgment debtor and could take possession of its contents. In the course of its decision the court defined the status of a safe deposit company, and we think it worth while to repeat its language here. The court said:

"The contract with the trust company made it a bailee of the contents of the box. It was a custodian for hire, and had no other interest than the receipt of the rent charged, which, in accordance with its rules, was paid in advance. One of the keys was in the possession of the defendant, but this could be used only in connection with the master key held by the company. It was liable for due care, and by its rules stipulated that no one but the rentor, or his agent, should be allowed access, except in case of disability, death, or insolvency."

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## BANKS LIABLE FOR CUSTODY OF BONDS GRATUITOUSLY HELD

Since banks throughout the country have been accepting for safe-keeping liberty bonds, without making a charge for their services in doing so, the question of their liability in the event the bonds are lost or stolen has become very important. This question was considered in the case of *Kubli vs. First National Bank*, 186 N. W. 432. In this case Kubli had deposited certain liberty bonds with the First National Bank for safe-keeping. These bonds were kept by the bank in a filing case which was located in the bank vault. This filing case was constructed of brick and was not burglar-proof. Besides this filing case, the bank kept in this vault a steel safe, and in this safe it kept its own securities and the securities of some of its customers. This vault was broken open by burglars and the securities in the filing case were stolen, although the safe was not tampered with in any way. The question was whether under these circumstances the bank was liable to Kubli for the loss of his bonds. It was conceded that the law requires a bank in a case of this kind to

exercise reasonable care in taking care of the deposits, but the question which it was difficult to determine was what constituted reasonable care under the circumstances.

#### INTERESTING BANKING DECISIONS.

State and municipal bonds held by decedent must be included for purpose of determining net value upon which Federal Estate Tax is based, according to a recent decision of the United States Supreme Court in the case of Mary Louis Greiner, executrix, versus the Collector of Internal Revenue at Pittsburgh. In holding that the Federal Estate Tax applies to transfer of property of whatsoever character, including municipal bonds, upon death, Justice Brandeis says:

*"That the Federal Government has power to tax the transmission of legacies was settled by Knowlton vs. Moore (178 U. S. 41); and that it has the power to tax the transfer of the net assets of a decedent's estate was settled by New York Trust Company vs. Eisner (256 U. S. 345). The latter case has established also that the estate tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax like that on income from municipal bonds. Pollock vs. Farmers Loan & Trust Company, supra. A State may impose a legacy tax on a bequest to the United States, United States vs. Perkins (163 U. S. 625), or on a bequest which consists wholly of United States bonds, Plummer vs. Coler (178 U. S. 115). Or vs. Gilman (183 U. S. 278). Likewise the Federal Government may impose a succession tax upon a bequest to a municipal corporation of a State, Snyder vs. Bettman (190 U. S. 249), or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a State as inheritance tax, for the estate tax is the antithesis of a direct tax. New York Trust Company vs. Eisner, supra. Municipal bonds of a State stand in this respect in no different position from money payable to it."*

It has been the established law in the State of California that a note secured by a mortgage is not negotiable when taken by a purchaser who has knowledge of the security. In the recent case of Pitman v. Walker, 203 Pac. 739, the Supreme Court of the State of California modified this rule by holding that it only applied in the case where the mortgage was executed and delivered contemporaneously with the execution of the note.

The National Bank Act and numerous State laws impose a secondary or double liability on shareholders. One means by which such double liability has, in some instances, been avoided has been the organizing of holding or security corporations, which hold the stock in the banking institution. The holding corporation is, of course, liable to the same extent as an individual stockholder would be, but since this liability cannot go beyond the assets of the corporation and the stockholders therein are not subject to a secondary or double liability, it follows that where a holding company's assets are not increased beyond its ownership in the banking institution, a secondary or double liability is thereby avoided. An illustration of the application of this is found in the decision of *Benton vs. American National Bank of Macon*, 276 Fed. 368.

# MEDICO-LEGAL ETHICS AS APPLIED TO CHIROPRACTIC

By Geo. F. Ort, of the Chicago Bar.

It was said by Greene, C. J., 1 Rd. 356, that the law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society.

This, as the aegis of the law, which is confirmed by innumerable supporting expressions in subsequent opinions throughout the land, though it postulates the touchstone of precedent, is not by any means mere case law.

Precedent in order to be a true touchstone as a basis for the progress and expansion of the law must be predicated upon ALL the facts of the case. Only in that way can a rule exhibit a principle of law applicable truly to human relations and conditions.

Chiropractic as an economic and social force in the community continues to labor under a heavy load of prejudice against a strong political current set in motion and controlled by the so-called "regular" practitioners of medicine. It comes into public notice usually under the blight of contemptuous opposition on the part of those practitioners of other "schools" who do not "believe" in it as a dependable method of healing the sick. The weight of such a belief is due to the adroit way in which the established schools assume a proprietary monopoly in the function of "healing the sick." This presents a psychological proposition made possible by the sacredness with which the "healing of the sick" ordinarily is regarded in a civilized community. Notwithstanding this, the history of patent medicine shows that the veriest charlatan skilled in the unction of "healing the sick" can put it all over a confiding public and get rich at the game, regardless of, or usually in connection with, doctors and druggists, and his success is measured by the degree of mysticism with which he can mix a little sugar water with some bitter-sweet substance of kick and tang to be taken with a wash of wonderful cures, in the newspapers. It is convenient to be cured in that way without medical or legal ethics. The cure comes by the bottle and requires least time and trouble to take in that way without contact with doctors. The general convenience of it has lent itself well to the education of the public by judicious advertising added as "overhead" to the price per bottle. By contrast you might have the only panacea for all the ills the human flesh is heir to yet you would not dare to persuade the public by specifying the ceremony of going to the nearest cross-road in the dark of the moon while taking the cure and making a cross in the dust, as a test of respect to the Great Giver of all good gifts and graces. The thing would be unavailable. It would cost fifty million dollars to educate the dear public,—even if the remedy were gratis and no one were making a cent of profit. All those merits combined could not overcome the ridicule which the established "schools" could level at the prescribed *ceremony*. All the beneficence would be swallowed up in one apt word of ridicule to characterize the *ceremony*. All the wrath of the gods of established "medicine" would be turned loose against it, not openly and on the merits but by some indignant pretense of a police regulation concerning the ceremony, in total eclipse of the merits of the remedy, all because the ceremony would be taken as the contact of doctorhood.

The art of healing is an institution no less than the institution of divinity and jurisprudence. Those who do not "belong" are under suspicion,—*strange* critters in the herd. All are intrenched in practice and habit. Man is a conventional bundle of habits. Some say even his illness is mostly habit. By the performance of the one little fundamental ceremony of the Golden Rule he could fulfill the divine law and thereby scrap all his habits underlying those three institutions but he is so enmeshed in the clutter of his habits he cannot accomplish the simple ceremony of the Golden Rule. When you gaze upon the wholesome leanness of wild animals you must be persuaded that the chief activity of civilized man is in his struggle with the clutter of his own mental filth. He loves it like Harums' dog his fleas. The swing and flourish of habit makes it automatic. They keep him in touch with himself. It is systematized so as to run smoothly day by day, each unit in its established place. Each unit has its wedge, its salary, its fee, tending to self-sustaining profit and the prosperity of the community subject to such police regulations as may seem necessary to guard against any undue straining of the rules of the game which would disturb the established order of things, and so will continue into a state of advancing complexities until, in the logic of our limitations, the whole thing will collapse like the one horse shay in a universal cross-purpose of chaos.

The development of the art of healing unlike divinity or jurisprudence has been within well defined historical data from a barbarous condition until now it has become a science of many branches of exceedingly refined learning, the acquiring of which in a rudimentary degree involves a study course of several years to gain a working idea of the intricacies of the human organism and the action of applied medicine. But it has its detractions. The empiricism of such knowledge conversationally speaking makes the practice a perpetual experimentation of the effects of medicine on the human organism. Speaking as a layman the symptomatology in which such experimentation begins cannot be classed as an exact science. This is demonstrated by the necessary reliance of the practitioner on the patient's speech and intelligence to locate pain, etc. A proof is that to the average veterinary the locating for instance of the point of lameness in a horse is usually guesswork. A layman never can tell whether it is in the fore or hind quarter nor whether it is in the foot or in the upper joints. There is a kind of mystery about this which is not readily solved.

As in the old days an ordinary handicraft was commonly spoken of and regarded as a mystery, so the modern art of healing has its air of mysticism in the popular conception; and associated with that is an abiding instinct or superstition which finds a function or rather a lack of it in a psychology something akin to a survival of, for instance, voodooism. As an analogous illustration, it is not so many years since the courts in enforcing laws passed in the exercise of the police power of our civilization, gravely passed judgment in the witchcraft cases. The element is not limited to the medical field. It is political too. A parallel exhibition of the psychological effect of reiteration of a species of such voodooism from interested quarters was that in order to win England's war by strictest neutrality, everything that was not pro-British was proclaimed as pro-German, to the entire exclusion of pro-America. Even the Supreme Court after the nation was in the war in spite of our "neutrality", in the draft and espionage cases, fell into the psycho-

pathic degradation. By the means of such "neutrality" the British political bastards in control of the government succeeded in plunging the nation into a devastating war. And our boys are in discreet quarters still "wisely" regarded as heroes instead of martyrs to the diabolic machinations of the English sparrows in our midst.

It is up through such mental and moral muck of material interests manipulated by the force of control of government by conspiracy that the process of civilization slowly works its way toward the white heights of correct and dispassionate thinking and sane living. Chiropractic is in that struggle. The things in question here require pitiless publicity.

The irony is that the muck at the top, so-called, i. e., the political muck, makes regulations for the controlling of the muck at the bottom,—the so-called underworld,—when it does not coalesce with it or use it for the accomplishment of its own predatory ends. Chiropractic is a victim of that process.

In that way the police power of government operates to repress the avowedly destructive forces and leaves the controlling and ostensibly constructive forces beyond its reach,—with the exception of isolated instances of those who "don't belong". These instances could be cited as examples for demonstration were they not matter within the sphere of enlightened intelligence. Generally speaking the matter is sufficiently illustrated in the separation, for instance, of the legal profession into three classes: first, those practitioners who delve in the opulence of the fraudulent and vicious commercialism and financing which just now have the producers and the consumers of the community by the throat with such strangling effect that extortionate retail prices persist in the face of industrial over-production and stagnation; second, those practitioners who live by their practices rather than their practice; and third, those who are martyred in their determination to uphold the fine traditions of the dignity of professional ethics. The same analysis no doubt is true of the medical profession.

Thus it will appear that human interests and their relations are in a state of perpetual turmoil where even professional ethics must beware lest it take itself so seriously that too much mentality or insufficient sympathy by a hard-boiled insistence upon arbitrary ceremony, produce a moribund condition which will bear little or no relation to the human equation. By disregarding that necessity or rule, ethics is in constant danger of being merely evidence of faith in things unseen. Ethics, in order to remain a practical force, needs to be simply honorable according to enlightened standards,—good conscience,—the chief dignity of gentility. Every man who does not realize this, regardless of selfish interest, must be said to be without moral character. But so long as ethics is a part of adjective law, so long must it keep time with substantive law.

It still is true that the law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society.

The citations in the previous articles indicate a maize of statutes concerning the right to practice the art of healing. The provisions are so diverse in their language that a cursory reading of them is apt to leave a question as to whether it is disease which is more to be dreaded than practitioners without a license in the "old schools", who would try to heal them.

In view of the diversity in methods of healing and the obvious difficulties in the way of applicants for license who would ensure the use of all the possible methods, it would seem that disease is in most states to be borne patiently unless a cure is possible by restricted methods of the old schools.

It is not readily apparent why there should be so much diversity of statutory requirements in the several states concerning the practice of medicine; the make-up of examining boards; and the qualifications of applicants for license to practice. The cause for such contrariety is not inherent in the subject of healing nor in the practice itself except as to the latter may appear in the judicial recognition that country practitioners are not held to the same requirements of the high degree of efficiency of those practitioners of large cities who, from the greater facilities available in the art, are expected and supposed to be more efficient. Manifestly, the question of personal efficiency of the practitioner does not affect essentially the human organism; its susceptibility to disease; nor its responsiveness to the healing agencies. Whether it be the congestion of large cities; small-pox, tuberculosis or yellow fever and malaria due to climatic or other regional conditions; there is no apparent reason that these would not affect substantially all persons alike exposed or require substantially similar treatment of healing.

The political philosopher in the exercise of extraordinary complacency of mere legalism may be content in the notion that it can hardly be expected that there be unanimity in forty-eight state jurisdictions. But it is a similar complacency by which the mathematical philosopher is content with the idea that the impossibility of trisecting the angle or squaring the circle is due to the extraordinary sufficiency of the mathematical system.

The decisions cited from the various jurisdictions are confined to the adjective features of the respective statutes. The several courts are restricted to the ascertainment of the legislative intent in any given statute and therefore give little if any enlightenment upon substantive law as it should concern the static elements of the human organism and the universality of the character of disease and its healing. And so the community has a profusion of "decisions" added to a confounding of statutes which are insoluble by the rules concerning the "conflict of laws" because the relation of physician and patient is seldom if ever a matter of interstate proportions, except possibly in consultations or direct services by noted specialists or experts called into a given case from other states. This condition, it is true, is somewhat ameliorated by some of the statutes which provide a sort of reciprocity as to qualification of applicants for license but even this accommodation to uniformity does not exist in all the statutes.

The struggle in the advocacy of uniform laws throughout the states shows that almost any phase of commercial, police or sumptuary regulations by reason of diversity of local customs and circumstances might be said to require laws limited and adapted peculiarly to local necessities. For instance, commercial paper made by a man and his wife might be so affected by local constitutional provisions differing in the several states, concerning the status of the wife's personal estate or as to her status as a joint promisor or partner or as to the competency of evidence or witnesses, that insurmountable obstacles would prevent uniformity of statutes which would include such paper; and local commercial usage and property rights conceivably might in numerous particulars, present so many unavoidable exceptions to such uni-

form statutes that the enactment in many states would practically nullify the idea of uniformity, yet a uniform commercial instrument act is well on its way of adoption by the several states. Likewise it is not inconceivable that constitutional obstacles touching interest and recording of mortgages which might prevent uniformity of statutes concerning sales of personal property, yet a uniform sales act is rapidly being adopted by the several states.

Again, the status of children, minors, heirs, etc., may be exceedingly diverse and insolubly bound up in local law as rules of property, yet uniformity of the marriage relation and divorce is seriously attempted.

Generally speaking there is hardly any field of commercial, financial or industrial activity which lends itself without serious obstacles to the idea of statutory uniformity, yet the idea of uniformity is steadily gaining ground as to so many subjects that the idea is along lines of a serious and systematic general movement.

Now, by way of comparison, it is manifest that a subluxated vertebra as known in chiropractic must occur in the same ways, cause the same ailments and the nerve yield to the same curative or preventive agencies in Maine as in California or in any intermediate state. Neurasthenia, rheumatism or any other disease is not affected by state lines, neither is the learning, ability and efficiency of the practitioner. In other words the whole subject of disease, and the curing of disease lends itself most clearly to the idea of uniformity in the licensing of practitioners yet the several legislatures and courts themselves are enacting, construing,—creating,—diversities squarely in the face of the systematic movement for uniformity in the infinitely more difficult subjects.

In those states which by the local statute or by means of an examining board make it impossible to obtain a license to practice anything but allopathy without a complete knowledge of allopathy there may be a total lack of remedy. Experience seems to indicate that allopaths do not need to have such complete knowledge of allopathy as do candidates of other schools in order to obtain a license. It being a fact that in many cases, numbering into the thousands, disease yields to chiropractic where the patient cannot be cured by the allopathic methods and so such patients theoretically are doomed in some states to suffer approaching death in the philosophy that legislators, courts and examining boards can do no wrong.

By the necessary diversities created by legislature, etc., it has come to pass that a disease incurable in one state may be curable in another. A person who has a given disease may shortly be advised by his physician of the Old School to journey to a distant state where certain curative practitioners are permitted or to still another state where certain preventive practitioners are authorized. Of course no one would undertake to say what a construing court may guess in a case of a complication of several diseases requiring the patient's presence in several states at one and the same time.

Now, no matter in which state the student would gain his education in the particular school in which he might desire to practice, allopathy does not necessitate a knowledge in homoeopathy or vice versa. To this extent there is a sort of sympathy between them,—a sort of lymphatic partnership; bloodless surgery as osteopathy and some other schools are called do not require education in the use and its consequence of the scalpel; Christian Science dispenses entirely with the scalpel, mortar and pestle and its antecedents



and consequents; the psychological schools, such as the Freudians, dispense with all the schools, even the Scientists; and the latest school, chiropractic, regards merely the spinal column and the function of the nerves radiating therefrom as a basis of education and practice.

After the students without hindrance by any of the states have gained their education in their respective schools they find themselves no nearer the "swim" than the "hickory limb" of the law. In this it seems that the allopaths and the homeopaths insist that while those who arrive by the other paths ought not to be permitted to practice because they do not know the learning of the allopaths and homeopaths they themselves are entitled to practice all the other schools without any education in them whatsoever. To a crass layman it would seem that such a contention is sympathetically alling in ways that would yield to the remedies of those who are educated in the peculiarities of bone and nerve. It may be they (the chiropractors) would be willing to do this if the allopaths and homeopaths who, by the age of their schools and political prestige generally, officiate as Examining Boards, would license them to do so.

At the risk of spoiling a perfectly good case of humor, for treatment by any one who is really a good humorist, I want to add that the experience of the students in bloodless, knifeless and drugless schools from the time they get their diplomas to the time when they get a license, grills them with all the political, professional, financial and social ills the human flesh is heir to from perjury around the circle to forgery and bribery.

The graduate of any school who does not know sufficient of allopathy or homeopathy to secure him a license from the board in the state where he obtained his education is required to cast about him in the statute or decisions of other states or to find out whether the state board of some one of the states is so constituted as to assure him a license. Unless he happens to be a permanent resident of such a state, he next has to find out whether his home state statutes afford any such reciprocity with the licensing state as to facilitate an application for a license on the strength of his license in the other state. In this way it may happen that a practitioner be educated in one state, licensed in another state and practices in still another state. On another view, if graduates find it necessary to remove permanently into some state where license is easily obtained, it may result that in a short time some states will have all the chiropractors, others all the osteopaths and still others all the scientists to the extent that they are not really allopaths or homeopaths, and the rest of the states might have all the "psychopaths".

The above mentioned reciprocity between the states is essential for the reason that a license in one state does not in and of itself give the licensee a right to practice in another state, as a matter of privilege and immunity from discrimination against the citizen of other states under the Federal Constitution. This is so because the licensee in order to practice in another state of practical necessity removes to the last mentioned state unless in isolated cases he lives so near the State line as to dispense with actual removal; but where he actually does remove into the State he thereby ceases to be a citizen of another State and is entitled only to the same treatment as other local citizens and the matter ceases to be one of interstate proportions under the Federal Constitution.

There is a well defined trend toward a general use of all methods men-

tioned in what is called the eclectic school, which a goodly number of practitioners of the Old Schools favor as a last resort in baffling or unusual cases which do not yield readily to old methods and remedies. But this trend manifestly is contrary to the more general trend to specialize, particularly in the cities. The specializing in some branch of a subject of such a vast field of learning and requiring such extensive experience to make even a specialist dependable, no doubt is the preferable trend so far as concerns the welfare of the public.

It would therefore seem to a layman that if the Old Schools really have the interests of the public at heart they would at least as an organized force, discountenance political obstacles and wrongful oppression, of requiring unnecessary learning and refrain from doing anything that tends to prevent the new schools from working out their own salvation in the specialty to which each is devoted. Otherwise the public will eventually become educated and storm the Old Schools, legislators and judges with the method of "bone-setters."

The whole community is vitally interested in every case of disease and to a much greater extent than merely the isolation of contagious cases and if it is true that the police power must be used to protect the public against individual incompetence it can not be true that a given case or a given practice is the personal and private oyster of the particular practitioner, whether he be of the old schools or the new schools. The old schools would be well occupied in eradicating the petty jealousies between the schools and they could do much in a general constructive way to make all the methods dependable. The personal jealousies tend to create personal secretiveness which would not exist were the practitioners in some of the schools not fearful of ungrounded criticisms by the others. From this tendency to secretiveness as a personal self-defense the public is the real sufferer. The cause of such difficulty could be removed constructively by expanding the practice of consultation by a more general co-operation on the subject of symptomatology in the discussion of particular cases without additional expense as a rule to the patient.

This can be done concretely and on view without violating professional ethics as to secrecy or hypothetically as lawyers frequently discuss facts and law of cases. In that way the different practitioners would be encouraged to consult one another instead of being induced to secretiveness and possibly error to the hurt of the patient. The circumstance that the opponent of the medical practitioner is insensate nature as compared with the opponent of the lawyer make the suggestion to consult freely of far broader application to the medical profession. It will scarcely be claimed that any one man, be he most thoroughly educated, knows all there is to be learned of medical practice, any more so than any man knows all the law. Conservative and hide-bound as lawyers are supposed to be, the most brilliant does not despise the suggestions of his less pretentious "brother-in-law." Lawyers learn from one another and so can the doctors if they will lay aside petty jealousies and co-operate constructively for the benefit of the public. Until they do this legislators admittedly representing the whole public should hesitate to enact statutes which tend to discriminate between the several schools.

*(To be Continued.)*

## MONTANA BONDED ABTRACTER'S LIABILITY

An interesting question has been presented for discussion, and that is, What is the liability of sureties on the bond of an abstracter required by the law in Montana? This question and certain other problems presented by that law will be given consideration.

That the discussion be understood it is essential to know the provisions of the act in question. The act is chapter 44, Montana Laws of 1915, page 62, and reads as follows:

"An act to compel abstracters of title to real estate to file a bond for the protection of those with whom they deal, and to procure a seal; to provide for the issuance of a certificate of authority to such abstracters; providing that their fees are a matter of contract; also that any properly certified abstract of title shall be prima facie evidence in the courts; also providing for a new or additional bond and the procedure to be followed in procuring the same, including an appeal to the district court; and providing penalties for the violation of this act.

Be it enacted by the Legislative Assembly of the State of Montana:

"Section 1. It shall be a misdemeanor for any person, firm or corporation to engage, or continue, in the business of making or compiling abstracts of title to real estate, in the State of Montana, for compensation or hire, without first filing with the State Treasurer a bond or undertaking in the penal sum of Five thousand (\$5,000) dollars, running to the State of Montana, for the use of any person, aggrieved, with sufficient sureties, to be approved by the judge of the district court; such sureties shall be at least two in number if personal sureties are furnished; such bond or undertaking shall be conditioned for the faithful performance of duty by such abstracter, and the payment of any and all damages that any person may suffer by reason of any error, deficiency or mistake in any abstract or certificate of title, or any continuation thereof, made or issued by such abstracter.

"Section 2. When any abstracter shall have filed a bond or undertaking as herein provided, he or it, shall be entitled to receive from the State Treasurer a certificate reciting that he or it is entitled to engage in the business of making and compiling abstracts of title to real estate in the State of Montana, which certificate shall be valid so long as the bond given by such abstracter shall remain unimpaired and no longer. The State Treasurer shall be entitled to receive a fee of one dollars (\$1) for issuing such certificate.

"Section 3. The compensation to be charged and received by abstracters of title shall be and remain a matter of contract between the parties.

"Section 4. Any abstract of title to real estate, certified to be true and correct by any abstracter holding a valid and subsisting certificate of authority from the State Treasurer, as herein provided, shall be received by the courts of this state as prima facie evidence of its contents, under such rules and regulations as to procedure as such courts may promulgate.

"Section 5. The bond or undertaking herein provided for shall be in full force and effect for a period of one year, and shall be renewed annually; but the Attorney General may, upon complaint of any reputable citizen, require such abstracter, upon ten days written notice, to furnish a new or additional bond, or to show cause before the State Treasurer why he or it has not done so, and if within said ten days no new or additional bond has been filed, with approved sureties, and not any sufficient reason is shown to the State Treasurer why a new bond should not be required, then the State Treasurer shall, in writing, annul the certificate of authority of such abstracter.

"Section 6. It is the duty of the Attorney General to appear before the State Treasurer in behalf of the complainant and to cause a transcript of any testimony taken to be made by a stenographer; either the abstracter or the complainant may appeal to the District Court of the County in which the complainant resides from the decision of the State Treasurer, who shall certify the record, including the testimony, to said court; the district court shall hear the appeal in a summary way, on such record, and the costs of such appeal, including the furnishing of the testimony, shall be taxed against either the abstracter or the complainant, which ever is defeated on such appeal.

"Section 7. Any abstracter qualifying under the provisions of this act shall procure a seal, which seal shall have stamped thereon the name and location of such abstracter; and shall deposit with the State Treasurer an impression of such seal before a certificate shall issue; which said seal shall be affixed to every abstract, or certificate of title issued by such abstracter.

"Section 8. Any person, firm or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars (\$500) for each offense.

"Section 9. All acts and parts of acts in conflict with this act are hereby repealed.

"Section 10. This act shall be in full force and effect on and after the first day of April, 1915."

It is provided by statute in Montana that, in the construction of a statute, the intention of the legislature is to be pursued if possible. *Montana Code, 1921, Sec. 10520.*

Statutes with analogous provisions to the one in question are in force in North Dakota, South Dakota, Kansas, Nebraska and Oklahoma. The interpretations that have been given these statutes established precedents that are to be and will be considered.

It is to be observed as a general proposition that where a bond is given under authority of a statute it will be presumed that the intention of the parties was to execute such bond as the law requires. The statute constitutes a part of the bond as if incorporated in it, and the bond must be construed in connection with the statute. The obligors are presumed to have known the terms of the statute and to have bound themselves with reference thereto. *Crawford v. Ozark Ins. Co., 97 Ark. 549, 134 S. W. 951; U. S. Fidelity Co. v. Fultz, 76 Ark. 410, 89 S. W. 93.* The bond must be construed, as to the scope of its obligation, to cover the objects of the statute in requiring it, and the statutory provisions will be as binding as if set out in the bond in terms. *State v. Wotring, 56 W. Va., 394, 49 S. E. 365; People v. Metropolitan Surety Co., 311 N. Y. 107, 105 N. E. 99.* And a statutory bond is to be given the effect which in reason must have been intended by the statute. *People v. Wilson, 169 Ill. App. 452.*

To whom are abstracters and the sureties on his bond liable in damages under the provisions of this law in Montana?

It is a general rule that an abstracter is liable in damages on account of errors of omission or commission in an abstract only to the party who employed him to make the abstract. Such an action is founded on contract, and privity of contract or contractual relations must have existed to support the action. But in some jurisdictions strict privity of contract is not essential in all cases. This is true in Montana where it has been held that an abstracter is liable in damages to a party other than the one who ordered the abstract, if the abstracter knew the abstract was for the exclusive benefit and use of such party, that he would rely upon it, and the abstracter delivered it to him. *Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 107 Amer. St. R. 435.* Such, therefore, is the law as to liability of an abstracter in Montana independent of the act here under consideration. However, section 1 of the act provides the bond shall be "for the use of any person aggrieved" and "conditioned for the payment of any and all damages that any person may suffer by

reason of any error, deficiency or mistake in any abstract or certificate of title, or any continuation thereof" made by the abstractor. It is manifest that under the provisions of this section an abstractor's liability is extended beyond the scope of the general rule above stated, for he and his sureties are liable on the bond given by them to "any person" without regard to privity of contract. Similar provisions in like acts in other states have been so construed. South Dakota.—*Goldberg v. Siseton Loan & Title Co.*, 24 S. Dak. 49, 123 N. W. 266, 140 Amer. St. R. 755. Kansas.—*Arnold v. Barner*, 91 Kan. 768, 39 Pac. 404. Nebraska.—*Gate City Abstract Co. v. Post*, 55 Nebr. 742, 76 N. W. 471; *Crook v. Chilvers*, 98 Nebr. 684, 157 N. W. 617. Oklahoma.—*Sackett v. Rose*, 55 Okla. 398, 154 Pac. 1177; *Scott v. Jordan*, 155 Pac. 498.

In construing the Oklahoma act making an abstractor liable for "all damages that may accrue to any person by reason of any incompleteness, imperfection or error in any abstract furnished by him," and holding privity of contract not essential to sustain an action, the court, in *Scott v. Jordan*, supra, said: "The construction given the foregoing section of our statute is a wholesome one, and is in accord with legislative intent, as expressed therein. The owner is the person who usually orders an abstract of title to real estate. In doing so, his purpose, ordinarily, is the sale or incumbrance of his property, and he presents the same to the prospective purchaser or mortgagee for the purpose of showing the true condition of his title. Usually the purchaser or mortgagee relies on the correctness of the abstract, and if he does so, to his injury, the abstract company is liable to him, upon its bond, on account thereof, under said section. This statute widens the sphere of an abstractor from that of the common law, and his liability is likewise widened."

Another reason has also been assigned for the extension of an abstractor's liability under these bonding acts. The act in Nebraska provides, as does section 4 of the act in question, that an abstract made by a bonded abstractor shall be prima facie evidence of its contents in the courts of the state. Discussing this provision the court in the case of *Gate City Abstract Co. v. Post*, supra, said:

"By the common law, as we interpret it, the owner of real estate could only utilize an abstract as an argument to reinforce his own assertions concerning the state of his title. It might be persuasive but was without legal efficacy. He may now use it as evidence in an action.  
\* \* The right to use an abstract is not limited to the person to whom it is issued. Any one may use it, and any one against whom it is employed may be injured in consequence of the certificate being false.

Having thus widened the abstractor's sphere of action, it was quite natural that the legislature should also widen the abstractor's liability."

Under the terms of section 1 of the Montana act an abstractor is liable on his bond, as stated, to "any person" who "may suffer" damages by reason of an error, etc., in any abstract, etc., made by him. The word "any" is defined in Webster's New International Dictionary as meaning: "One indifferently out of a number; one (or, as pl. some) indiscriminately of whatever kind or quantity." And in *Corpus Juris* (vol. 3, p. 294, sec. 8,) it is said, "Any person means all persons, every person, and as ordinarily used includes both natural and artificial persons or corporations." Clearly that is the meaning of the term as used in the statute in question; that is to say, each and every person who may "suffer" damages in respect of the matters specified. The law does not confer the right of action upon one person only, but upon each and every person who "may suffer" damages for a cause within the scope of the act.

To have a cause of action on a bond under this Montana statute one must "suffer" damage. In like acts in other states a right of action is given for all damages that may "accrue". It has been well said that "Suffered means paid. To suffer damages does not mean to incur a liability for damages, but means that damages have been actually paid. So a guaranty that a person shall be liable for damages suffered means damages paid." *Beckman v. Van Dolsen*, 70 Hun. 288, 24 N. Y. Supp. 414, 418. In Oklahoma (as in the Dakotas, Kansas and Nebraska) the statutory bond of an abstractor is required to be conditioned that the abstractor and his sureties will pay all damages that may "accrue to any person" by reason of any incompleteness, etc., in any abstract furnished by him. The word "accrue" as used in that sentence, as held in the Oklahoma case of *Walker v. Bowman*, 27 Okla. 172, 111 Pac. 319, 30 L. R. A. N. S. 642, means to become a present and enforceable demand. A cause of action accrues from the time the right to sue for the breach attaches. The right of action against an abstractor for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered or damages result therefrom. The contract made by an abstractor is not one of indemnity, but is a contract that he will faithfully and skillfully do the work he contracts to do, and his contract is broken as soon as he, through negligence, or ignorance of his business, delivers an erroneous abstract of title. *Walker v. Bowman*, *supra*; 72 Amer. St. R. 315 note; 12 L. R. A. N. S. 449 note; 12 Ann. Cas. 412 note. "An abstractor generally is not liable for a defect in the abstract which does not cause an injury; there can be no recovery where no loss is

shown. It is necessary that there be actual damages as the direct consequence of the abstracter's failure to perform his duty." *Abstracters of Title, Niblack, sec. 32.*

Such being the fundamental rule it is not apparent that the use of the word "suffer" in the Montana act expresses anything different in respect of damage from that rule, or changes the character of a bonded abstracter's liability. Damages that any person may "suffer" simply means "actual" damages, and as used in the statute is but an affirmation of the common law rule.

Section 1, therefore, so far as its provisions are concerned, gives to each and every person who has been actually damaged by a defective abstract a right of action against the maker of the abstract without regard to the common law requisite of privity of contract. But we now come to a very interesting limitation imposed upon this construction of the section.

The Constitution of Montana provides: "No bill, except appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Section 23, Article 5.

The title of the act in question is not general and all comprehensive, but, on the contrary, is one of particularity; that is it specifies the particular subjects of the act. The subject matter of the act must be germane to and within the scope of its title. The first clause of the title states the subject of the act to be "An act to compel abstracters of title to real estate to file a bond for the protection of those with whom they deal." It does not say it is an act to compel abstracters to file a bond for the protection of persons using their abstracts, or for the protection of the public, or the like. On the contrary the act is to protect those who "deal" with abstracters. The word "deal", used as a verb, means to transact business, to trade; and used as a noun applied to intercourse between parties, it includes any transaction of any kind between them. 17 C. J. p. 113. It signifies a business relationship. *Tobin v. McKinney*, 145 D. 52, 84 N. W. 228, 230, 91 Amer. St. R. 688.

Section 1 must be read and construed in connection with this clause of the title. So read and construed the "any person aggrieved" and the "any person" damaged must be a person with whom the abstracter dealt on whose bond that person seeks a recovery for a cause assigned by the statute. The liability of abstracters, therefore, under



this act, is to those with whom they deal, and not to anybody and everybody who may suffer damages by reason of an error, etc., in abstracts made by them, but who had no dealings with them in respect of the abstracts. The construction of section 1 must be restricted to the pertinent subject stated in the title. Thus an act entitled, "An act concerning promissory notes and bills of exchange" with provisions in the body of the act as to all promissory notes, bills of exchange or "other instruments in writing," was held void as to all instruments named therein except promissory notes and bills of exchange. 18 *Ann. Cas.* 1074. And likewise an act entitled, "An act to prohibit the sale of spirituous, vinous and malt liquors" was held invalid so far as it dealt with the subject of bitters, beverages and drinks not either vinous, spirituous or malt.

And the case of *State v. Merchant*, 48 *Wash.* 69, 72, 92 *Pac.* 890, is illustrative. Therein the court said:

"It is, however, contended that the title is insufficient in another particular. It will be observed that it is limited to the protection of stockholders and persons dealing with corporations, while the body of the act provides that the publication of the fraudulent or exaggerated statement to persons "dealing with said corporation or its stock" shall subject one to punishment. The act thus clearly makes it a penal offense to publish false statements to persons dealing with the corporation. It is also with equal clearness made an offense to issue such a statement to persons dealing with the stock of the corporation. Dealing with a corporation and merely dealing with its stock are distinct subjects. One may deal with the stock of a corporation in the open market and in no sense deal with the corporation. The subject of dealing with the stock is clearly not comprehended in this title, and to that extent the act must be held invalid.

"We think, however, the act must stand so far as it relates to dealing with corporations.

"The dealing with corporations, as mentioned in the act, must mean more than the mere act of holding stock and refers rather to ordinary contractual dealings, which may be done by either stockholders or others."

Assuming the word "deal" as used in the title of the act in question signifies contractual relations, it is yet unlikely that it will be construed as necessitating actual privity of contract, in view of the Montana case above cited, *Western Loan & Savings Co. v. Silver Bow Abstract Co.*, wherein it was held, prior to the enactment of this law, that an abstracter is liable to one to whom he delivers an abstract, knowing

he will use and rely on it, though that person did not order and pay for it.

It appears that bonding laws like the one here in question charge an abstracter with knowledge of the use to be made of each abstract when ordered, and to charge him with liability in connection with such use. Such was the holding in *Crook v. Chilvers*, 99 *Nebr.* 684. In this case one Van Norman ordered an abstract of title which he delivered to the plaintiff in the case, to be used by him in connection with a sale of the land to him by Van Norman. The plaintiff relied on the abstract, suffered damage by reason of a defect therein and brought the action. The court said: "When he (the abstracter) furnished the abstract, he was bound to know the use to which the abstract would in all probability be applied. He thereby became liable for all damages which might be sustained by reason of any defect in his abstract, not only to the one who employed him to make it, but also to the parties who might deal with such party in reliance upon the abstract so furnished."

Though, as stated, acts similar to the one in question have been held to entitle one damaged by reason of an error or imperfection in an abstract to a right of action without regard to privity of contract between such party and the abstracter, yet it does not appear reasonable that such construction will be extended to include all cases of damage to all possible parties. The nature of an abstracter's liability is not changed by this or other like acts; it continues to be founded on a contract of employment. An abstract is not made an article of trade and commerce and its maker, a warrantor of its quality and fitness. The fact would seem to be that the liability of an abstracter under these acts extends only to a party for whose use and benefit his services are employed to make or continue the abstract, though such employment be contracted and paid for by some other party. If the abstract, as is generally the case, be subsequently used and relied upon in other, different and later transactions than the one with respect to which it was originally prepared, and some person be damaged by such use, that person has no cause of action against the maker. No reasonable construction of this act would seem to justify any other interpretation.

There must have been a contract to create a liability, and the liability must arise from a breach of that contract. As the court in the case of *Thomas v. Carson*, 46 *Nebr.* 765, 65 *N. W.* 899, construing the Nebraska act similar to the one in question, said:

"The relation between an abstracter and his employer remains as it was before the statute was enacted, purely contractual, the only difference being that the bond is a guaranty of his skill and faithfulness

and perhaps his fidelity. In order to maintain an action on a statutory undertaking of an abstracter it is necessary to show that the act of omission or commission alleged as a cause thereof is a breach of conditions, expressed or implied, of the particular engagement to which it relates. If the error occasioning the loss is not a violation of the terms or conditions of the contract of employment it is not a breach of the bond."

An abstracter, who, in accordance with the terms of his contract, makes an abstract based on a limited search, that is a search of specific records, or only as to specific instruments, is not liable in damages to a party who relies upon it as an abstract including other matters, or as a complete abstract, and is damaged in consequence. *Thomas v. Carson*, *supra*; 72 *Amer. St. R.* 317 note; 12 *L. R. A. (N. S.)* 449 note.

An action against an abstracter arises from a breach of his contract of employment, and hence there is but one cause of action against him. He is not liable in damages for successive injuries resulting from any one employment.

The bond required must be in the sum of \$5,000, "with sufficient sureties, to be approved by the judge of the district court; such sureties shall be at least two in number if personal sureties are furnished." The act does not repeal the common law touching the liability of an abstracter. He may be sued at common law for damages and the full amount thereof be recovered. And a plaintiff is not obliged to exhaust his other remedies before he may maintain his action on the bond. He need not first sue, for example, on the covenants of his deed or take an assignment of the judgment. *Gate City Abstract Co. v. Post*, *supra*.

The object of a penalty in a bond is to limit the obligation of the signers. *Morrison v. Boggs*, 44 *Nebr.* 248, 62 *N. W.* 473. And in the absence of a condition extending their liability, sureties cannot be held liable for more than the penal sum specified; that sum, in a universally admitted rule, fixes the limit of their liability, subject to an exception. *Foster v. Passerieux*, 37 *Pac. Super. Ct.* 307; 21 *R. C. L.*, sec. 128; *Sutherland on Damages*, 4 ed., vol. 2, p. 477. The exception by the "later and apparently preponderance of authority is to the effect that whenever the penalty becomes a debt due and payable as to the surety, he is as much liable for interest thereon as if he had been originally the principal debtor, not, however, as a part of the debt for which he became responsible, but as damages for its detention, and it is immaterial that the allowance of interest may make the judgment in excess of the penalty named in the bond." 21 *R. C. L.*, sec. 128. As elsewhere said:

"It may be a reasonable doctrine that a surety who has bound

himself under a fixed penalty for the payment of money \* \* has marked the utmost of his liability. But when the time comes for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable and altogether just that he should compensate the creditor for the delay which he has interposed." *Brainard v. Jones*, 18 N. Y. 35; *Sutherland on Damages*, 4 ed. sec. 478.

The amount that may be recovered is that which is compensation for an injury that must be the natural and probable consequence of the error or negligence that occasioned the injury. The injured party must exercise reasonable care to reduce or restrict the cost of the damage done him, and he can recover in full therefor and for the damage, even though his efforts to reduce or restrict the loss increase it. So, on principle and weight of authority, if the prosecution or defense of a suit is made naturally and proximately necessary by a breach of contract,—that is by reason of an error or defect in an abstract,—the cost of litigation, reasonably and judicially conducted, paid or incurred, including reasonable attorney's fees, may be recovered as part of the damages. *Washington County Abstract Co. v. Harris*, 149 Pac. 1075.

The act in question provides that when the required bond is furnished the abstractor shall receive a certificate of authority to do business, which shall be valid so long as his bond "shall remain unimpaired and no longer," and "the bond or undertaking \* \* shall be in full force and effect for a period of one year, and shall be renewed annually."

It is the general rule that the duration of a bond to secure performance of the duties of an office or employment is co-extensive with the duration of that office or employment. In the instant case the employment, or authority to do business, is continuous so long as the bond required is "unimpaired," and "renewed," so that the bond is not co-extensive with the employment. On the other hand the statute limits the duration of a bond to one year. The abstractor can continue to do business throughout the year for which the bond is to run, if his bond remain unimpaired during that year. Impliedly if the bond be impaired during the year for which it is to run, the abstractor must furnish a new bond if he wishes to continue in business.

Under the statute sureties are not liable for the acts of their principal after one year,—the year for which the bond is to run. Since a cause of action against an abstractor is founded on a breach of contract, that of employment, the cause of action accrues when the abstract or certificate is made and delivered, and not when the error is discovered or damages result therefrom. *Walker v. Bowman*, 27 Okla. 172, 111 Pac. 319, 30 L. R. A. (N. S.) 642 and note. The liability of

sureties on the bond, therefore, is with respect to contracts of employment of their principal entered into within and during the period for which the bond they are on, is in force and effect—a period of one year.

It is a universal rule that a bond has no retroactive effect, and does not cover past delinquencies, unless by its terms it is to have such effect. *Brandt on Suretyship & Gty.*, 3 ed. §ec. 625; *Stearns on Suretyship*, 2 ed. sec. 129; *Pingree on Suretyship and Gty.*, sec. 69. On this point it is said in *Sutherland on Damages*, 4 ed. vol. 2, sec. 480:

"It is a universal rule that sureties are only liable for the defaults of their principal during the term for which their bond was given and after it was given; for such contracts cannot be extended by construction. The doctrine is comprehensively stated by Mr. Justice Daniel of the Federal Supreme Court. 'This court has settled the law to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable.' *Jones v. U. S.*, 7 How. 681, 12 L. Ed. 870.) Where an officer is his own successor his sureties for either term are bound for him and should be held precisely as though the principal had succeeded some other person instead of being his own successor." And see 103 *Amer. St. R.* 940 and note.

This principle has been applied in cases involving actions for damages on abstracters' bonds required by statute. Thus, in Kansas it was held that an abstract prepared about two months prior to the time the bond was accepted and approved, would impose no liability on the sureties for omissions or errors previous to its execution. But if the abstract is re-certified within the period a bond is in force, liability thereon will thereby be created as in the case of an original abstract. *Arnold v. Barner*, *supra*. And in South Dakota sureties were held not liable on their bond in an action that accrued forty-five days before they executed the bond. *Goldberg v. Siseton Loan & Title Co.*, *supra*.

It is manifest that under the terms of the Montana act a bond does not become effective until, after approval, it is filed with State Treasurer. A bond, however, executed as of a specific date and conditioned for one year from that date, will operate to cover liabilities incurred from and after that date, and within the ensuing year, though it is not approved and filed until some subsequent date. *Stearns on Suretyship*, 2 ed. sec. 129. Under a statute in Arkansas, all fire, life and acci-

dent insurance companies doing business in the state were required to "annually give a bond" to the state, with not less than three sureties, to be approved by the State Auditor, conditioned for the payment of all claims arising and accruing to any person during the term of said bond on account of policies issued, and it was further provided "such bond shall be renewed annually." In a case under this act, the bond sued on was delivered to the State Auditor March 16, 1900, and approved. It was conditioned for one year ending March 1, 1901. Plaintiff's property was destroyed by fire March 2, 1900. Liability on the bond for his loss was sustained. Though the bond did not become effective until presented and approved, and contracts of sureties are not to be given retroactive effect, yet the bond specifically provided it should have effect as of its date, which made it retroactive with respect to the date of its approval. *U. S. Fidelity & Gty. Co. v. Fultz*, 76 Ark. 410, 89 S. W. 93.

Section 5 of the act in question provides that the bond shall be "renewed annually." In its popular sense, renew means to refresh, revive, or rehabilitate an expiring or declining subject. 34 Cyc. 1330. And renewal means that which is made anew or re-established; a change of something old for something new; the establishment of the particular contract for another period of time; the substitution of a new right or obligation for another of the same nature. 34 Cyc. 1331. A renewal contract in contemplation of law constitutes a separate and distinct contract for the period of time covered by such renewal. *U. S. v. Bayly*, 39 App. (D. C.) 105, 41 L. R. A. (U. S.) 422.

Renewals of bonds furnished to secure the faithful performance of duty by employees have been repeatedly held not to operate as continuing contracts, but that, on the contrary, each renewal is a separate and distinct obligation. *Proctor Coal Co. v. U. S. Fidelity etc., Co.*, 124 Fed. 424; *De Jernette v. Fidelity & Casualty Co.*, 98 Ky. 558, 33 S. W. 828; *Brunswick v. Harvey*, 114 Geo. 733, 40 S. E. 754. In this last case it was said, the original bond was terminated by the renewals, and the latter were new and distinct contracts, which, by reference, adopted all the terms and conditions of the first bond. And the case of *De Jernette v. U. S. Fidelity etc., Co.*, supra, is very illustrative. *De Jernette*, a sheriff, was furnished a bond to secure him against loss on account of dishonesty of his deputy, conditioned for a period of one year, and expressly providing that during such term or any subsequent renewal the bonding company would make good a loss within the terms of the bond. At the expiration of the year for which the original bond was given, the company issuing the bond gave a renewal receipt in which this language was used: "The contract under bond No.

53,939 is hereby renewed in accordance with the terms of the bond, the guaranty to cover the period above named only." The period covered was the year next ensuing after date of expiration of the original bond, No. 53,939. It was held this renewal constituted a separate and distinct contract for the period of time covered by the renewal, and that the liability of the company for any act committed during a given period must be governed by the terms of the contract or bond in force at the time of its commission. In other words, a renewal bond, unless it expressly so provides, does not effect an extension of the original bond, or become a substitute for it; the original and renewal are not one and the same bond, but separate and distinct contracts.

Since, under the Montana act, the right of an abstractor to continue in business is contingent upon his having an unimpaired bond on file with the State Treasurer, the successive bonds given by an abstractor are, with respect to that right, renewals, in the sense that each successive bond is effective to continue, extend or renew his license to do business. But, as heretofore stated, the liability of sureties is not retroactive in the absence of plain provisions to that effect, but prospective, and, under the law in question, prospective for one year only. The act does not provide that any bond shall have retroactive effect, unless the word "renewed" used in section 5 be construed to impose that effect. But there is no authority to support that construction and to impose a liability contrary to the fundamental rule. Were it so construed then the first or original bond of an abstractor, not being a "renewed" bond, would have prospective operation, and each successive bond thereafter being a "renewed" bond would be retroactive as well as prospective. For a "renewed" bond would have to be retroactive in order to take the place of the original bond, that is to be a substitute for it, otherwise no protection would be afforded those who dealt with the principal during the term of that bond.

In the case of *Miller v. Macoupin County*, 7 Ill. 50, a school commissioner held office from 1883 to 1889 inclusive, without any new appointment, but as a continuing term of office, giving annually a bond for faithful performance of duty. It was held that the annual bonds imposed separate and distinct liabilities upon the sureties on each bond, determined at the end of each year for which given. The bonds were not successively substitutes the one for the other.

The liability of an abstractor at common law has not been repealed by this statute. At common law a judgment may be had for the full amount of any damage one may suffer, and any and all assets of the abstractor, not exempt from execution, may be taken and sold

to satisfy the judgment. The statute gives an action on the bond, but fixes the maximum recovery that may be had. If the sureties pay the full sum of their commitments, but take no steps to compel the furnishing of a "new" or substitutional bond, or an additional bond as permitted by sections 5 and 6, their liability would no doubt continue. The statute does not place a limit upon an abstracter's liability to all persons. He must keep a bond unimpaired or go out of business. As often as one is impaired he must furnish another up to the limit of his ability, just as at common law he must pay damages to the limit of his assets.

As applied to abstracters the statute of limitation begins to run from the time an abstract or certificate is delivered. 15 *L. R. A.* 160 note. The Montana statute of limitations applicable imposes a five years' limitation. (*Montana Code*, 1921 sec. 9030, relating to an action on a contract, not founded on an instrument in writing.) That statute applies to the liability of sureties on the abstracter's bond. They are liable for breaches of contracts by their principal entered into during and within the period for which they are sureties. And the statute of limitations begins to run in their favor as to each of such contracts, and abstract, certificate or continuation, from the time of its delivery.

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The examination of the title to some land in Ray county, Missouri, shows the land patented to Alexander Campbell in 1836. By mesne conveyances James Madison acquired the title in 1870. He died a short time after that, contrary to the ordinary teachings of history. An affidavit furnished with the title, signed by Daniel Webster by mark, shows the names of the heirs of James Madison. It is perhaps also worth remarking that one of the daughters of Madison was named America.

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#### FAULTY ADVICE

As to an instrument not entitled to be recorded, one often hears this advice given: Record it. It will get into the "next fellow's" abstract and he will get actual notice of it, and have to take notice of it. One giving such advice overlooks various possible and probable facts, as follows:

The "next fellow" may not get an abstract, nor make or cause to be made a search as to the title.

He may get an abstract and not examine it, or claim he did not, and therefore that he did not see the instrument.

He may get an abstract and the instrument, by accident or mistake, may be omitted from it.

He may search the records and fail to note or see the instrument.

In all these cases an instrument entitled by law to be recorded and imparting constructive notice by reason of being recorded, would impart constructive notice notwithstanding any one or all of these facts. The advice is not sound. It should not be relied upon.



# TITLE AND ABSTRACT DEPARTMENT

**Frank C. Hackman, Editor in Charge**

The Potter Title and Trust Company, of Pittsburgh, Pennsylvania, has had a splendid growth in business since its incorporation, October 7, 1902, as the following financial statement shows: May 28, 1907, deposits, \$48,342.27; resources, \$310,460.35. May 3, 1912, deposits, \$546,513.92; resources, \$1,067,614.25. March 22, 1917, deposits, \$1,858,537.16; resources, \$3,063,418.01. April 4, 1922, deposits, \$4,249,504.39; resources, \$5,953,981.39. Incorporated on the date above stated, it paid its first dividend July 1, 1903; opened banking department April 18, 1907, and trust department September 30, 1913. Since incorporation it has paid total dividends of \$353,187.68, and earned surplus and undivided profits of \$221,392.21. It does a banking, trust, guaranteed mortgage and title insurance business.

## ANOTHER CALIFORNIA MERGER

The Security Title Insurance and Guarantee Company of California, with which is affiliated The Riverside Abstract Company and the Santa Barbara Abstract and Guaranty Company, has recently taken over the Fresno County Abstract Company. This latter is one of the oldest title companies in California, doing business in Fresno County, which ranks second among the counties in the United States in value of agricultural products. The acquisition of this company gives the holding company a paid up capital for the three affiliated companies of over \$600,000, with a field of nearly 20,000 square miles, having a population of over 250,000. The expansion of the Security Title Insurance and Guarantee Company presages a vigorous development of title insurance in the area of its operations. Glenn A. Schaefer is president of the latter corporation.

Apropos of the fact that in some states the maximum charges an abstractor may make are fixed by statute, it is to be noted that the quality of the abstract,—what must be shown and the extent of the showing,—are not prescribed. In a business that is subject to competitive conditions which universally prevail in the abstract business, one gets what one is willing to pay for, and no more and no less. And when one is limited as to what charge may be made for any service or thing, one can only furnish just so much and no more of the service or thing. Abstracts are used as a convenient medium for disclosing what specific rights a person has to land and the condition of those rights. To effect its purpose an abstract must present all the facts in respect of the title. A law fixing an abstractor's charges necessarily places a limit upon the cost of presenting the facts and, therefore, limits their presentation. In other words, such a law in effect says, If it costs more than so much to show certain matters they must be shown only to the

extent they can be at the price fixed, even though that extent may or may not disclose all the material facts required.

And in some states where abstracters' rates are fixed by statute, the public officers who keep the records concerning land titles are required by law to make abstracts of the records in their respective offices, on demand, and for fees fixed by statute. In view of this fact there would seem to be no need at all to regulate the charges private abstracters may make, for they could not secure any more for their services in competition with the public officials, independent of competitive conditions among themselves, than patrons might feel a superior service justified.

The recording system is a matter of public interest, and is wholly, of course, a creature of and subject to the control of the legislature. But how private parties may choose to supply each other with evidence of their land titles is not a matter of general public interest. One man may want to and does deal with land on the basis of a guaranteed certificate; another prefers an insurance policy; some other wants an abstract, and yet another may accept a deed with covenants without any evidence of title at all. It is a matter of individual policy with which the legislature has no concern, and it would appear, therefore, that the abstract business is not having a public interest justifying legislative price fixing.

Abstracters can do a lot to help themselves without appeal to the legislatures. If they desired any number in any state could associate themselves together and secure a bond for fifty or one hundred thousand dollars conditioned to pay any person all damages that he might suffer by reason of any error in any abstract made by any member of the association. And they could make the indemnity available to every party relying on their abstracts. They could collectively afford each other indemnity for a loss. They could prescribe the terms, conditions and qualifications for membership in the association and all other details. Patrons might deem such protection so advantageous as to make it a special inducement attracting business. If each abstracter can furnish a bond, as required by law in some states, in the sum of five thousand or ten thousand dollars, a dozen or more collectively ought to be able to pay the premium for a bond ten times as large.

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#### WHEN JUDGMENT LIENS COMMENCE

The common law rule, still in effect in some states, is that judgments of a court of record relate back to the first day of the term, and are considered as rendered on that day. Hence, the lien of a judgment attaches to the debtor's realty as of the date of the beginning of the term, and is paramount to conveyances or mortgages executed the second or any sub-

sequent day of the term. The commencement of a judgment lien is now, however, prescribed by statute in most of the states, and the aforesaid rule abolished or modified. These statutes vary in their provisions. In some states the lien of a judgment attaches "from the first day of the term at which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced shall bind such lands only from the day on which such judgments were rendered." In other states the lien attaches "at or after the date of such judgment, or, if it was rendered in court, at or after commencement of the term at which it was rendered." Among other dates of commencement fixed by statute are "the day of rendition of the judgment;" "the day on which it is docketed;" "the date on which it is registered;" the date the judgment is "recorded and indexed;" the date of "actual entry;" the date judgment is "entered and pronounced by the court." In at least one jurisdiction a judgment is a lien from the date of its rendition as between the parties and all others with actual notice or knowledge of it, but is not a lien so as to affect bona fide purchasers or encumbrances prior to the time it is docketed.

Judgments of a federal court commence to be liens when judgments of the highest court of the state in which the federal court is situate become liens. For example, if the law of a state makes judgments of its courts liens from the time they are docketed, and does not provide for the docketing of judgments of federal courts in the same manner, then the judgments of the federal courts in that state commence to be liens as soon as docketed in the office of the clerk of the federal court. But if the law of the state expressly authorizes the docketing of federal court judgments in the same manner as judgments of the state courts, then the judgments of federal courts in the state do not operate as liens until docketed in the manner provided by state law. Again, for illustration, if a judgment of a state court is a lien from the time it is rendered, then the judgment of a federal court in that state is likewise a lien from the time it is rendered in that court.

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Those who think the only matter building owners and managers give thought and attention is that of what rentals they can charge, ought to read the reports of the proceedings of the annual conventions of the National Association of Building Owners and Managers. The report of their fourteenth annual convention, an excellently printed book of 615 pages, discloses that building management, to be efficient, requires a knowledge, more than superficial, of various arts and sciences. The report contains addresses and discussions on city planning and zoning, building heights, light, heat, sanitation, building material, alterations, building and floor plans, fixtures, ornamentation, general and special service, organization, employees' welfare, management, etc., having a wealth of technical detail that makes them valuable from an educational and practical business standpoint. Be it

said to the credit of this association that its members make their convention, covering usually four days, a meeting for intensive and serious study of problems in their business.

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#### ORIGIN OF BANKRUPTCY

The word "bankrupt" is derived from the French word "bancus" or "banque," signifying the table or counter of a tradesman, and the Latin word "rupta," meaning broken, denoting one whose shop or place of trade is broken.

Bankruptcy was unknown to the common law, and is therefore a creation of statute. The first bankruptcy act in England was enacted when trade and commerce began to develop, and was that of 34th Henry the 8th, chapter 4. At this present day the bankruptcy law is regarded as remedial, for the protection of creditors, and for the benefit of the debtor, his family and the general public. In sharp contrast with this conception was the purport of the early English bankruptcy acts, in which a bankrupt was invariably referred to as an offender, and considered in the light of a criminal. Their design appears to have been to prevent and defeat the frauds of criminal debtors. Only a trader who secreted himself or did certain acts tending to defraud his creditors could become a bankrupt. Hence a solvent person could be declared a bankrupt, and one who was insolvent was not consequently a bankrupt. The act above mentioned of Henry the 8th was altered by 12th Elizabeth, chapter 7, to include persons "who used the trade of merchandise," wholesale or retail, or sought their living by buying or selling. By 21st James the 1st, chapter 19, a scrivener receiving monies or estates in custody or trust could become a bankrupt. Subsequent acts up to and inclusive of 5th George the 2nd, chapter 30, extended the scope of bankruptcy to include bankers, brokers and factors.

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#### SOME FACTS ABOUT THE PUBLIC DOMAIN

The entire public domain originally contained (estimated) cessions, 259,171,787 acres, purchases 1,593,139,200 acres, or a total of 1,852,310,987 acres; cost, \$88,157,389.98, or 4¾ cents per acre. Purchases contained 1,593,139,200 acres, cost \$81,957,389.98, or 5 1/10 cents per acre. The various purchases, their respective costs, area, and cost per acre follow: Louisiana purchase, \$27,267,621.98; 756,-961,280 acres; 3 3/5 cents. East and West Florida from Spain, \$6,-489,768; 37,931,520 acres; 17 7/10 cents. Mexico, Guadalupe Hidalgo, \$15,000,000; 334,443,520 acres; 4½ cents. Texas purchase, \$16,-000,000; 65,130,880 acres; 24 7/12 cents. Mexico, Gadsden purchase, \$10,000,000; 24,142,400 acres; 34 3/10 cents. Alaska, \$7,200,000; 369,529,600 acres; 1 19/20 cents. State cessions from Georgia, \$6,-200,000; 56,689,920 acres, 10 10/11 cents.

# BOOK REVIEWS

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## LONG TERM LAND LEASEHOLDS

This new authoritative work on Real Estate law, including 99-year leases, by Stanley L. McMichael, former Secretary of the Cleveland Real Estate Board, is the first of a series of text books planned by the National Association of Real Estate Boards. The book was written after years of study and research covering this fascinating subject of growing importance in cities throughout the country. The use of 99-year leases is increasing constantly and it behooves real estate men, attorneys, credit managers, bankers, public officials, investors and students to be thoroughly familiar with them.

The volume contains twenty-two complete chapters, covering every phase of the subject. It is handsomely bound in heavy blue silk board covers, stamped in gold. Pages are six by nine inches in size and the main portion of the book is printed in clear open-face 10-point type. It is a fine example of the printer's art. A valuable feature is an addenda containing five complete 99-year lease forms.

Twelve years were spent by the author in collecting data, preparatory to presenting the subject in book form. It is the first volume ever written which deals with this most interesting and practical real estate development. It was compiled by an experienced real estate man, himself engaged in making 99-year leases. It is clear and concise, yet devoid of unnecessary legal technicalities.

A most useful addenda includes five complete 99-year lease forms, containing from 3,000 to 10,000 words each. There are also standardized agreements to make a lease, a mortgage instrument, a complete assignment form, a mortgage waiver, valuable annuity, worth of money and valuation tables, and other interesting documents difficult to procure. The addenda occupies nearly as much space as the book itself.

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## UNIFORM LAWS ANNOTATED

Edward Thompson Company of Northport, Long Island, New York, have presented for the approval of the legal profession a complete set, in nine handy sized volumes, of all the uniform state laws approved by the National Conference of Commissioners and adopted by the various states. These are unabridged and complete, including all amendments to the close of the legislative sessions of 1921.

The publishers are to be commended for having become pioneers in an established and rapidly expanding field of American law. Each book of the set is so constructed that it may be kept separately up-to-date by an annual cumulative supplement in pamphlet form.

The excellence of each feature of this work is guaranteed by the publishers, whose standing in the law-book world is second to none other.

The price for the set complete is fixed at \$36.00, and the supplements may be had at \$5.00 a year. This set of works is sold only by the publishers and cannot be had through other law-book houses.

# PERSONAL SKETCHES

## HON. CHARLES E. CHIDSEY

"It is difficult for a man to speak of himself without vanity; therefore I shall be short," says Hume in the account of "My Own Life" affixed to his Essays. In such matters brevity is not only wit, it is modesty, a quality that well becomes every man.

Charles E. Chidsey was born on the ninth day of October, 1859, in the city of Memphis, Tennessee, his mother being a native of Devonshire, England, and a lineal descendant of the great Sea Kings, the Drakes of Devonshire; his father was from New Haven, Connecticut, his ancestors coming from the Hooker Company, from Sussex, the village of Chertsey, a village made famous by Dickens in "Oliver Twist."

The family moved to the city of New Orleans, by boat, in 1864, from thence going to Mobile, Alabama, in 1865. Young Chidsey attended the schools of Mobile for about two years, then moved to the piney woods of Southwest Alabama in 1870. For five years he saturated his mind with woodland lore, and

"In nature's infinite book of secrecy,  
A little I can read."

He moved to Pascagoula in March, 1875, studied law under Hon. Charles H. Wood of Moss Point and Horace Bloomfield of Pascagoula; was admitted to the Bar in 1879, and did his first literary work for The Mobile Register, 1883, under the nom de plume of "Clipper." Was elected Justice of the Peace in 1890, a position he has held since, save an interval of eighteen months.

During the interval of waiting and schooling, Mr. Chidsey learned to read with ease Greek (Ancient and Modern), Latin, French, Spanish, Italian and German. In April, 1890, he contributed to the Popular Science Monthly an article giving a scientific explanation of the phenomenon known as "The Mysterious Music of Pascagoula," and in 1892 to the defunct Shakespeariana a short article showing that the word "Dewberry" was a Warwickshire dialect word used only by Shakespeare, and that once in "The Midsummer's Night Dream;" elsewhere in the counties of England this plant was known as the "running blackberry."

From 1898 to 1915 Mr. Chidsey was quondam editor of The Pascagoula Chronicle. In August, 1915, he contributed two articles to The Manufacturers' Record, on International Law. In September, 1915, he wrote several articles on the history of German militarism, showing that the world had been warned as early as in 1879 of the coming cataclysm.

In 1918 he gave Mrs. Grundy a fit when in a series of articles he warned the world of the rapid growth and dangers from Communism and Bolshevism in the United States. He demonstrated that the Revolutions of France, 1789, and in Russia, 1917, were and are epidemics of madness, such as are common in the world's history from time to time, and that America was no more exempt from this madness than she is exempt from the Bubonic Plague or the Spanish Flu.

Mr. Chidsey's last important contribution to science is "Knots and

Boles in Forest Trees," in the Scientific American Monthly, November, 1920, taking his hints for his observations and investigations from passages in "Troilus and Cressida."

The series of articles in re Baconian Theory which have appeared in The Lawyer and Banker are the ripe fruit of years of study in every department of knowledge.

Mr. Chidsey is a finished scholar, a good lawyer, and, above all, a perfect type of the American citizen.

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#### HARRY FRANKLIN PAYER

Payer, Harry Franklin, trial lawyer and public speaker, born in Cleveland, Ohio, July 3, 1875. Was graduated from Cleveland Central High School in 1893; from Adelbert College of Western Reserve University, A. B. degree, magna cum laude, in 1897; and from Cleveland Law School with honors in 1899.

From 1901 to 1907, in public office as Assistant City Solicitor to Newton D. Baker (former Secretary of War), in the administration of Tom L. Johnson, Mayor of Cleveland.

Now senior member of law firm of Payer, Winch, Minshall & Karch, Attorneys, 20th floor Cleveland Discount Building, Cleveland, Ohio.

Member of Phi Beta Kappa honor scholarship fraternity, American Bar Association, Ohio State and Cleveland Bar Associations, Cleveland Chamber of Commerce, Cleveland Athletic Club, and numerous fraternal organizations. Chairman of Judiciary, Legislation and Reform Committee of Cleveland Bar Association.

Married to Florence L. Graves of Cleveland, June 24, 1902; has one son, Franklin Lee Payer, 18 years of age, entering Yale this fall.

According to one school of psychics, every person is surrounded by an aura, a sort of halo or background of colored light—invisible, of course, under all ordinary circumstances.

Granting for the moment that the psychics are right, it is easy to suppose that the halo might be colored to match one's disposition or character, or dominant traits.

For example, deep blue for a blue law reformer or lurid red for a vamp.

By this reasoning, the aura of Harry Payer, attorney, former assistant city solicitor and prominent Democrat, would be composed of delicate and unusual shades—pale lavender, heliotrope and the like.

It might possibly be the color of Payer's limousine, whatever that color may be. The limousine is painted one of the newest and most fashionable shades and usually starts an argument among pedestrians who see it go down the street as to just what shade it is.

Payer is always carefully groomed. The fashion magazines would probably call it "exquisitely groomed." In summer he wears a light palm beach suit carefully pressed. His cravats are of the delicate hues just under discussion. Often he wears a flower in the buttonhole of his coat. Sometimes it is a rosebud, a delicately shaded one of pink.

Payer's face is round and friendly. His complexion is clear and a bit pinkish. It's the face of the man who enjoys life and his work. His eyes are clear blue. His teeth even and white. Fine lines about the eyes add to the friendliness of his appearance.

The most noticeable thing about Payer's appearance is his smile. It's warm and expansive, taking in the whole world and easily called into play. An emphatic "no" spoken to the accompaniment of that smile becomes as sweetly musical as "yes."

Payer's fame rests chiefly on his oratorical abilities. These abilities made their appearance when he was a student at Central High School, giving him the reputation of the star student in the classes in oratory.

While he was assistant city solicitor under Mayor Johnson he gained the nickname of Demosthenes Payer. Did Democratic leaders decide it was time for a banquet, Payer was immediately the choice for toastmaster. Today the party never fails to accord him a place upon the platform when he will take it. His oratory is the most effective there. Jurors have often been known to weep before his oratorical barrage. Adverse facts about the case do not hamper greatly Payer's oratorical effectiveness. His voice is as flexible as a pipe organ, and usually he has the tremolo stop pulled out. Trifling details gain new importance in the way he tells them.

Were it raining outside, most people would convey that information to another with the simple announcement, "It's raining," possibly abridging the second word to "rainin'." But not Payer. He would describe the way the rain drops struck the pavement and the sound they made. He would compare the difference between the scene and that when the sun shone. He'd draw a philosophic conclusion, following that perhaps with one or two classical quotations, and then maybe a few statistics on rainfall.

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# THE Lawyer and Banker

AND

## SOUTHERN BENCH AND BAR REVIEW

CHARLES E. GEORGE, Editor  
FRANK C. HACKMAN, Associate Editor

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### *ITA LEX SCRIPTA EST*

*When Law and Order no Longer Remain as the Guiding Principles of all Peoples and all Institutions, then Civilization is Doomed to Atavistic Revolt*

This issue of THE LAWYER AND BANKER brings its fifteenth volume to a close. The next issue, that of January-February 1923, will be the first number of the sixteenth volume. That THE LAWYER AND BANKER has survived for sixteen years is evidence that it has had a mission, and has rendered an honorable and useful service which has commended it to a patronage, the number and quality of which it has good reason to be proud.

The mission of THE LAWYER AND BANKER is in the field of law. In the discharge of its mission it has aimed to analyze the current tendencies that have influenced legal policy, in respect of enactment, administration and interpretation of the law; and, moved only by highest considerations of what is fair and just, has aimed not only to approve but to forward what has seemed right and worth while, and fearlessly to criticise and oppose what has been wrong and not worth while.

But THE LAWYER AND BANKER has had another mission, a very real and practical mission, and this is to present for the enlightenment of the busy man or woman essentials of law that have a practical value as touching the daily activities of life.

THE LAWYER AND BANKER especially seeks to disseminate information as to the laws of real property, and as to the businesses which have to do with the preparation of abstracts of title and insur-

ance of title. As its mission in this respect it aims to present and to discuss the various problems that touch titles to real property, the abstract and title insurance business, important legislation, and those decisions of the courts which have particular value.

THE LAWYER AND BANKER favors an enlightened and conservative progressive policy in the field of real property law. Simplified forms of instruments for the conveyance or mortgaging of land, and a uniform system of execution and acknowledged should be adopted. To a certain extent real property is subject to the legislative power of the federal government, as well as to that of the state wherein it is situate, and the legislative power of the one is independent of that of the other. Congress can and does impose liabilities upon land wholly independent of state laws fixing the rights and duties of bona fide purchasers. Reciprocal general acts could effect an assimilation in this field and should be passed. THE LAWYER AND BANKER has pointed out other features of the law that might well be modified. Its policy has been constructive.

The business of the title man is of particular interest to THE LAWYER AND BANKER. It is a business founded upon law, and is peculiar in that respect. The recording system is wholly a product of statutory law. The extent to which matters affecting title to land are required to be of record measures the scope of the title business. It is rarely a big business, in the sense that other businesses have become big. But the thoroughness, the earnest effort, the conscientious aim to do well what is to be done, which the great mass of men in the business display, in the face of the relatively small rewards obtainable, is remarkable. When the vast volume of transactions involving immense sums of money which are effected in reliance upon the work of title men is considered, the rarity of suits against them for damages is itself a tribute to the character of the men in the title business. They are few in number, and widely scattered throughout the nation, so that associated effort is one of great difficulty. Yet they have done very well indeed to advance in business methods, and to effect an excellent general standard. THE LAWYER AND BANKER congratulates them. It aims to be of service to them, to improve in service, prophecies for them some years of unusual prosperity, and wishes them the rewards they deserve.

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### THE MENACE IN LAND CONTRACTS

THE LAWYER AND BANKER has been for over a year quietly making an investigation into the matter of the real ownership and ability to give good and sufficient titles to lots sold in the many sub-divisions

which are connected with 1100 of the largest cities throughout the United States. This concerns over 8000 sub-divisions and the results are startling as affecting the buyers' interests.

We find that in 724 out of the first 1000 sub-divisions investigated the concerns putting the lots on the market have no more title to convey than is represented by a 2% equity and if called upon in 431 sub-divisions to deed by good and sufficient warranty, could not do so.

We find values of \$6,000,000 represented by a "shoe string", \$7,-200,000 by equities of less than \$250,000 and over \$1,000,000 paid in to one gigantic jack pot by lot purchasers where they have not even a gambler's chance to win back the payments made to say nothing of obtaining real title to the land they expect to own.

If contracts issued on  $\frac{1}{8}$  of 1000 sub-divisions platted show danger of loss to purchasers, what may be said of the remainder? Land contracts become a menace in place of a choice investment, unless some radical change is made in the law.

THE LAWYER AND BANKER will present in each issue for the coming year the cold, hard facts and figures. It will insist that real estate exchanges and the various legislatures soon to meet shall by *action* make safe the purchasers of sub-division lots by a regulation or law that shall require that all sub-division properties shall be placed in trust with a reliable trustee—preferably a trust company; so that when the purchase price is paid, the buyer may be *sure* of his deed. These lots are bought largely as homes by men and women who should have all the protection that can be possibly given. There are thousands of jack-legs of real estate sharps who for a few hundreds of dollars, take an option on a forty, sixty or eighty acre tract; securing a deed, the property is mortgaged back to the grantor for nearly,—and may be more, than the real—market value of the estate. The promoter then sub-divides, and agents who could almost sell Angels in Heaven inside lots to Hades are set to work upon an unsuspecting public.

The protection purchasers should have is by seeing that a responsible trustee or trust company holds the property in trust for legitimate investors. The details of how these swindling operations are conducted will be given without fear or favor. Cities in all parts of the country are alike subject to the dangers now existant to the contract holder.

A trust company should be the medium through which the purchaser has assurance of a deed without delay or incumbrance and if it happens that there is a purchase money mortgage on the sub-division then the trustee or trust company may reasonably create a sinking fund

to pay off the incumbrance and have authority to execute releases as lots are paid for and deeds are delivered in fulfillment of contracts. All this work can be ideally handled by a trust company.

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## EDITORIAL COMMENT

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### PRESIDENT HARDING AND THE CLOSED SHOP

If enforced by the infinite power of the United States Government in accordance with the expressed spirit of the message, President Harding's address to Congress on the intolerable industrial situation, will transcend in importance, Abraham Lincoln's immortal Emancipation Proclamation on negro slavery.

Lincoln, fearless in duty, unswerving in adherence to the Constitution and the defense of human rights declared three million slaves free.

Warren G. Harding has taken an equally fearless stand, disregarding personal and party considerations and declared for the industrial freedom of 100,000,000 Americans.

The next question is, will Congress back the President with the necessary remedial legislation or subserviently yield to the expediency of local campaign complexes?

Chairman Jewell, of the striking rail shopmen, is quoted in the daily press as boasting that his men are "bound to win because the rapid deterioration of railway equipment is jeopardizing the lives of the travelling public." In other words, he anticipates and asks for victory, not on reputed merits of his contentions, but because the free working man, desirous of feeding and clothing his family, is deterred by death threats from making the necessary repairs to equipment.

Conspiracy is a flexible term, and one always difficult to prove in court, but the present situation unquestionably involves conspiracy on the part of organized labor to unlawfully interfere with inter-state commerce and the mails.

The position of the Big Four Brotherhoods, although usually characterized by sanity and fairmindedness, is untenable, when their members refuse to work because of the presence of state troops to guard lives and property, not against any anticipated violence by the Brotherhood members, but by the threatened continuance of riots and destruction by striking shopmen.

If that is not conspiracy then the word should be eliminated from the statute books and the dictionary.

This position is without consideration of the wage issue between the employer and employee, but based solely on the un-American means employed to force a favorable decision in favor of labor.

Unbiased and thoughtful study of the "closed shop" theory unquestionably proves that it is in absolute contravention of the constitutional rights of every one living under the American flag. The right to individual employment is as inalienable as that of organization and collective bargaining and neither can be lawfully denied.

The Herrin massacre, rivaling in cruel barbarity and despicable treachery the characteristics of the unspeakable Kurd, is the most damning chapter in

the history of alien boss rule of labor unions. It is indeed difficult to comprehend the psychology of the membership of the American Federation of Labor that submits supinely to sharing the disgrace of membership in an organization sanctioning wholesale cold blooded murder.

Several hundred thousand members of labor unions enthusiastically and patriotically enlisted in the world war to fight conditions no more abhorrent to civilization and humanity than the wanton slaughter of coal mine employes in Williamson County, Illinois. Wherein does geography enter as a factor in metamorphosing fiendish murder in Belgium into union closed shop prerogatives in America?

Internal strife as widespread as the present, represents a far greater hazard to a nation than perils from without. The solidarity resulting from inter-national troubles and dangers crystallizes the patriotism and highest traits in citizenship of a people. Success is then but a test of relative power, material resources, and intelligently organized effort.

Domestic unrest is a smoldering volcano, dynamic in its destructive force and a constant menace to the safety, peace and prosperity of the nation. Legislative enactment providing for adjustment of industrial disputes and the abolishment of strikes as conducted at present is manifestly imperative.

If ever the country needed sagacious, fearless and conscientious statesmen in Congress instead of the usual preponderance of trimming opportunist politicians it is now. The average congressional ear is "tuned in" only to catch the radio messages from the ballot box and not from the call of duty, even though it be "S. O. S." in the name of humanity and common honesty.

A Herculean task of cleansing the Augean stables of union labor confronts the honest American union labor man. Will it be done by the membership, as a matter of honor and pride or will an outraged public be forced to demand drastic methods of suppression of union labor practices?

The success of the Chicago Citizens Committee for Enforcement of the Landis Award is proof that the crooked labor boss and arrogant closed shop practices can be eliminated.

The recent conviction of forty union labor leaders by the State's Attorney of Cook County is further proof. And President Harding declares that he will "use all the power of the government \* \* \* to sustain the right of men to work."

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Democracy and capitalism are twin institutions. The same elemental human inspirations have nurtured them. They are the joint product of the age-old struggle to free the individual from the shackles of paternalism and autocracy and to establish him in a political and economic environment affording every opportunity for the development of private initiative, private enterprise and personal effort.

Eliminate what so glibly is termed capitalism, but which in all truth is efficiency and service exalted, from the history of the last three centuries and you at the same time would eliminate democracy; eliminate democracy and you would find capitalism absent.

The two institutions are correlated and reciprocal; the one cannot endure without the other. Both are so closely interwoven into the fabric of

the modern progressive state that a blow at one is equally a blow at the other.

There is ample proof for this in history. All anti-democratic movements have employed attacks on capitalism as a fulcrum upon which to rest the lever used for dislodging democracy. Russia first destroyed capitalism and with its life blood thus poisoned democracy became an easy prey for visionaries and spooks.

It is much easier and simpler to get a popular hearing for a denunciation of profits than it is for a fulmination against liberty; the demagogue finds that he can to better advantage excoriate the system which permits capital to grow and reproduce itself than he can inveigh against the principles of popular sovereignty.

And so we find in America today that those who are opposed to the principles of democracy are not directing their thrusts nearly so much at our fundamental political concepts as they are at our economic and industrial institutions, well knowing that if they first destroy the latter the former will automatically become part and parcel of the wreckage.

We are calling this situation to your attention because you are perhaps aware of the growing propaganda in this country directed against profits in business, and it is well to couple this knowledge with an understanding of the origin as well as the contemplated effect of this movement.

The doctrinaires and the pedants, the professional altruists and the common blusterers, the demagogues and the shysters, the selfish exploiters of new schemes, the half-brained and the hair-brained—all indeed of that great band of vocalists and exhorters in which this nation abounds—are engaged jointly and severally in pointing out that capitalism is a sinister and unsocial institution exercising a baneful influence on humanity, and should either be caged with repressive rules or altogether decimated.

In this propaganda there is a grave menace to sustained industrial progress as well as a constant, although seldom appreciated, threat against democracy.

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#### NOTICE

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# IMPLIED LIMITATIONS UPON FEDERAL TAX POWER

By General Samuel T. Ansell of the Washington, D. C., Bar

There is much vagueness of conception as well as confusion of thought upon Congress' tax power. We speak, in the language of the late Chief Justice, about "the conceded complete and all-embracing taxing power" of the Federal Government (*Brushaber v. Union Pacific RR. Company*, 240 U. S. 1), with minds reverting, however, all the while to "due process of law", "equal protection of the laws", "vested rights" and so forth. The suggestion of the application of these limitations to the Federal tax power may possibly be accounted for upon various grounds. First, there is our professed general belief in "fairness" and "equality" in sharing the burdens of government, modified to the extent that the contribution should bear a relation to the relative means of the tax-payers. We have judicial authority for saying, however, that theories of fairness, though controlling in other relations, become nice and impotent in the face of the stern necessity of getting enormous revenues—"Taxes are an uncommonly practical matter" and "tax laws have but little poetry in them." Then, too, the suggestion may grow out of professional habit or instinct. The tax power of the State is a subject of far more frequent professional consideration than that of the United States, and, being of an inherent character, is subjected by State constitution to a variety of regulations and limitations. Moreover, the State tax power falls under the ban of the Fourteenth Amendment, wherein the State tax-payer finds Federal protection against possible State violation of familiar safeguards. The fact that the citizen when he comes to pay his State tax finds the protection of the applicable limitations of the Bill of Rights through the medium of the Fourteenth Amendment suggests, at least, that when he comes to pay his Federal taxes he may expect similar protection in the Bill of Rights itself; whereas, in truth, in the exercise of that vital power there is a Federal freedom from fundamental limitations not known in the exercise of Federal power reaching the same subjects from other directions, and not known to the States with their self-imposed restrictions and their subjection to Federal constitutional limitations applicable to them but not to the Federal Government. Furthermore, we know that there is at least one implied limitation, that one which based on structural principles of government makes the United States and the States each independent of the taxing power of the other (*Collector v. Day*, 78 U. S. 113); and there is some evidence that express limitations may have their construction affected by fundamental implications of a limiting character (*Evans v. Collector*, 253 U. S. 245.)

A real basis for the suggestion, however, may be found in numer-



ous *dicta* of the Supreme Court, positive and oft-repeated but as yet unexplained and unapplied. They seem, indeed, to be but judicial reminders that such limitations will be found to exist if the tax power should ever be exercised so arbitrarily as to shock the judicial conscience and necessitate their use; in any event, the door does not appear to be completely closed against them. What they are, however, and what the occasions that might justify calling them from reserve, are matters unclarified by judicial statement. Justice Fields, in our most celebrated of tax cases (*Pollard v. Farmers' Loan & Trust Co.*, 157 U. S. 599), adopting the language of counsel as his own said, as learned Federal judges have in effect frequently said—

"There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations, as he justly observes, of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist and which are respected by every government. The right of taxation is subject to these limitations."

These "essential limitations" inherent in free government were not specifically pointed out.

Since that time constitutional amendment has relieved express limitations that restricted the free use of the power to tax incomes, in consequence of which the Income Tax Laws have become, and will doubtless hereafter remain, our chief dependence for raising the needed enormous revenues. The incidents of those Acts are such that they would appear to give ample opportunity, probably as ample as any Tax Act we are likely ever to have, for the judicial application of any implied limitations that may exist. The features of the Act of 1894 which were regarded as so inequitable as to serve as the basis for the declaration of invalidity, are all found in the recent Tax Acts and doubtless will similarly be found in all subsequent Acts. Our recent Acts have been criticised in respect of progressive taxation, discrimination, lack of uniformity, unfair exemptions, deductions at the source, extraterritorial applications, retroactivity, compulsory examination of tax-payers and their books, and summary distress proceedings; but such features have not been judicially found to be in conflict with fundamental limitations.

The only limitations possibly applicable would appear to be those contained in the Fourth Amendment in respect of unreasonable searches and seizures and those of the Fifth Amendment requiring due process of law and just compensation for property requisitioned or confiscated. The opinion of the Chief Justice in *Brushaber v. Union Pacific RR. Co.*, *supra*, disposed of the suggested application of these latter limitations with unmistakable emphasis: The due process of law clause can have no application to the taxing power, and no degree of arbitrariness can justify judicial intervention this side of confiscation. "Essential limitations" spoken of in 1895 could have been discovered more easily then than they can be now or are likely to be for some time to come.

# LIABILITY OF STOCKHOLDERS

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By Oscar J. Smith of the New York Bar.

Consternation has been spread among the stockholders of foreign corporations doing business in the State of Tennessee by the decision of the Supreme Court of that state in *Equitable Trust Co. v. Central Trust Co.*, holding that the stockholders in a foreign corporation which engages in business in that state without complying with the statutory requirements for the admission of such corporations to that state, are liable as partners for any debts contracted within the state or contracted elsewhere with a view to performance therein. This is natural enough when it is considered that, under the facts in that case, the rule applies to stockholders who have no knowledge of the corporation's delinquency and take no part in the conduct of its business, as well as to those who have such knowledge and do participate in the conduct of its business. If Mr. Rockefeller had, out of the kindness of his heart, taken a few shares of stock in the corporation in question, organized under the laws of Great Britain, to help out its promoters, he would be liable to the extent of his modest accumulations for all of its debts so incurred. And any one who becomes a stockholder in any corporation organized in any state of the Union or any foreign country, is burdened with the obligation of seeing that it does not engage in any business within the state of Tennessee, under penalty of being called upon to respond to the corporation's liabilities so incurred, if it does not comply with the statutory requirements. It is hardly to be wondered at that this decision has fluttered the dovescotes of high finance.

The facts, briefly stated, are that in 1883 a corporation was organized in Scotland, under the name of the Dayton Coal and Iron Company, for the purpose of operating coal and iron deposits in Rhea county, Tennessee, which company complied with the then existing statutes of the state of Tennessee with reference to the admission to do business within the state, and entered upon the business for which it had been incorporated. Subsequently, in 1895, another company was incorporated in Scotland, under the same name, for the purpose of leasing and operating the lands of the first company; still later, in 1897, a third company was organized in Scotland under the same name and for the same purpose, which succeeded to the business of its predecessors and continued to conduct it down to 1913, when, the company having become insolvent, a general creditors' bill was filed in the chancery court of Rhea county to have it wound up. Neither of the last two companies complied with or made any attempt to comply with the laws of the state of Tennessee with reference to the admission of foreign companies to do business within the state.

In the meantime, in 1903, the third company had authorized an issue of debentures to the amount of 100,000 pounds sterling, secured by its holdings in the state of Tennessee, 35,000 pounds of which, at the time of the filing of the bill in question, were in the possession of the Commercial Bank of Scotland and 55,000 in the possession of the Bank of Scotland, the ownership of the remaining 10,000 pounds not appearing. Some 6,046 of the shares of the Dayton Company, standing in the name of the Commercial Bank, were

voted by its proxies at the meeting at which the issue of these debentures was authorized, in 1903. It further appeared that the other bank held a considerable amount of the stock of the Dayton Company, but had not voted it at corporate meetings or taken any part in the management of the Dayton Company.

The Central Trust Company, as trustee under the mortgage securing the debentures, filed a cross-bill in said chancery proceeding, asking to have the said mortgage sustained as a lien on the company's properties, relief which was denied by the chancellor but, on appeal, granted by the Supreme Court, and the cause was remanded to the chancery court for the foreclosure of the said mortgage.

"In the meantime" as the court states—presumably before the decision of the Supreme Court sustaining the mortgage was handed down, certain creditors of the Dayton Company had filed a petition in the bankruptcy court praying to have it adjudged a bankrupt, and such proceedings were had as resulted in a sale of the company's property, for \$400,000, under an agreement that the proceeds of the sale should stand in the place of the property itself.

A third proceeding was begun in the chancery court of Rhea county, at what time does not appear, but inferentially after the validity of the mortgage had been affirmed, by a number of the creditors of the Dayton Company, seeking to hold the two Scotch banks liable as partners, upon the theory that they were stockholders in the Dayton Company and that said company had been doing business for a number of years in the state of Tennessee without having complied with its laws respecting foreign corporations. This is the instant case.

The learned chancellor, presiding in the chancery court of Hamilton county, to which the cause had been removed, held that the Bank of Scotland was not a stockholder, as the stock in the Dayton Company held by it was held as collateral security merely to secure advances made by it to the owners of said stock, but sustained the bill as to the Commercial Bank of Scotland, and granted a recovery against said bank in favor of certain of the creditors who had joined in the bill, but denied relief as to others, on the ground that their debts were not incurred in the state of Tennessee or incurred elsewhere with a view to performance there. It would seem clear that the only relief which the court could award the successful complainants was access to the Commercial Bank's share, as a holder of debentures, of the funds in the hands of the bankruptcy court, leaving them to seek any further relief, if their claims were not so satisfied, by resort to the courts of the defendant's domicile, Scotland.

This decree was sustained by the Tennessee Supreme Court, on the ground that the dealings of the Commercial Bank with the stock of the Dayton Company constituted it a stockholder, and, the latter company not having complied with the laws of Tennessee with reference to the admission to that state of foreign corporations, its stockholders were, with reference to all business transacted by it in the state, or transacted elsewhere with reference to performance in the state, partners, and as such individually liable for all the insolvent company's debts so incurred. There was no effort made to show that the Commercial Bank had actually participated in any way in the con-

duct of the Dayton Company, since 1903, when its stock was voted by proxy at the meeting which authorized the issue of the debentures.

The Tennessee court relied on its previous decision in *Cunningham v. Shelby*, 136 Tenn., 176; 188 S. W., 1147; L.R.A. 1917 B, 572, as determinative of the question of the bank's liability as a partner. That case was decided in 1916, but, by reason, doubtless, of the small amount involved, seems to have escaped the general attention which the instant case has attracted. It may be noted in passing that it, like the instant case, began in the courts of Rhea county.

In the Cunningham case, the defendants and plaintiffs in error were stockholders in a corporation chartered under the laws of Delaware, but which had its office and transacted its business in Rhea County, Tennessee, without having complied with the laws of Tennessee permitting foreign corporations to do business in that state. It was chartered as a development company and, carrying out that purpose, it opened an office in that county and proceeded with its business of promoting industries, etc. It is not so stated in the opinion, but is open to inference from the fact that service of process was had in Rhea county on the defendants, that they were residents of the county and probably the active agents of the company, if not the sole owners of its stock. The trial judge, Hon. Frank L. Lynch, charged the jury that the defendants were liable as partners for the debts of the plaintiffs, employed in the company's business, and in this he was sustained by the Supreme Court.

In so holding the court said: "We have no direct decision upon the question whether stockholders of such a corporation carrying on business would be liable as partners; but we have two cases which are based substantially on the same principle"—referring to its previous decisions, that such corporations have no standing before the courts for the enforcement of any right (with two exceptions, which it notes, but which have no bearing on the question involved in the instant case). The other cases referred to are *Morton v. Hart*, 88 Tenn. 327, and *Carter v. McClure*, 98 Tenn. 109.

We venture to respectfully dissent from the view that either of these decisions afford a precedent for the decision in the Cunningham case. In the first, it was held that, where a foreign insurance company had failed to comply with the Tennessee statute, a contract entered into in its name by an agent was binding on the agent, "since, inasmuch as he could not bind his principal, he bound himself." There was no pretense that the agent was a stockholder in the foreign company, and hence liable as a partner because of its failure to comply with the statutes with reference to foreign insurance companies seeking to do business in Tennessee. On the contrary, the decision was based upon the holding that "the defendants were undertaking to do an unlawful and prohibited act. In such undertaking they must be held to guarantee the solvency of the concern they represent to the extent of the requirements of our statutes, as cited, and that losses will be paid here."

Even less persuasive is the Carter case. There certain persons entered into an agreement whereby they subscribed severally for "stock" in a co-operative store, "to be organized without incorporation" and the "stock" to be under the control of three directors, to be elected annually by the lodge, to act in conjunction with the principal "stockholder" who was to be the

principal salesman, but there was no agreement to organize a corporation nor was any attempt made to organize one. Clearly, all persons who joined in the enterprise were partners, and liable as such, even though they saw fit, as among themselves, to place the control of the enterprise in the hands of persons to be elected by a lodge of which they were members. There are many cases of this kind, and in all of them, as a matter of course, the parties have been held as partners, since they formed no corporation, as required by the laws of the state, as a condition of the limitation of the liability of joint adventurers.

The case of *Harrill v. Davis*, 168 Fed. 137, also cited instead of affording support for the doctrine of the *Cunningham* case, as broadly stated, merely holds that persons who engage in business under a corporate name, without procuring the incorporation of the concern, are liable for its debts as partners, and that their liability can not be evaded or canceled by afterwards securing a corporate charter. The language of Sanborn, C. J., is well worth quoting as a statement of the correct rule. "Parties who actively engage in business for profit under the name and pretense of a corporation, which *they know neither exists nor has any color of existence*, may not escape individual liability because strangers are led by their pretense to contract with their pretended entity as a corporation. In such cases they act as the agents of a principal that they know does not exist and they are liable under a familiar rule, because there is no responsible principal. \* \* \* There are cases in which stockholders *who took no active part in the business of a pretended corporation*, which was acting without any charter or filed articles, who supposed that the corporation was duly organized, have been held exempt from individual liability for the debts it incurred; but if they had been *actively conducting its business, with knowledge of its lack of incorporation*, those decisions must have been otherwise."

And the court, holding that the defendants were clearly within the scope of the words which we have italicized, held them liable for all debts which *they* had incurred before they procured a charter, but not liable individually for debts incurred thereafter, although they failed to comply with all the requirements of the law with reference to filing their articles of incorporation, holding that they had become a corporation *de facto*, though not *de jure*.

Even less convincing is the case of *Mandeville v. Courtright*, 142 Fed. 97, also cited. According to the syllabus, "defendants, all of whom were stockholders and officers of a company incorporated in New Jersey, caused to be conducted in the State of Pennsylvania, in the name of the corporation, the business of dentistry, which the corporation had no charter right to carry on there, and which was in violation of a law of the state. Plaintiff, in ignorance of the existence of such a corporation, and supposing that she was in the hands of licensed dentists, submitted to an operation by an authorized employe of the establishment, who performed the work so negligently as to fracture plaintiff's jawbone. Held, that the defendants could not avoid personal liability for the injury by setting up the charter of the company, but that, *each having knowingly and actively participated in conducting the business, in violation of law*, they were liable as partners for all acts done therein."

This would seem sufficient to absolutely distinguish the cases. The de-

defendants were the actors—not passive stockholders, ignorant of the fact that the corporation, in violation of the laws of the state of Pennsylvania, was practicing dentistry there under the corporation's name, although, as stated by the court, by the law of Pennsylvania the company was forbidden to practice dentistry in that state; and, in a proceeding at the instance of the state government, it was ousted, after the plaintiff's cause of action arose, and, this not because of any failure to comply with the corporation laws of the state, but because a corporation could not, under the Pennsylvania law, practice dentistry. It would be rather singular to permit persons who conspire to violate the law, to escape liability for their acts while acting in pursuance of the conspiracy, by alleging their own turpitude, in violating the law. The court was particular to point out that the defendants all "*had knowledge* that the practice of dentistry was being carried on under the name of the Alba Dentists Company at said offices and that all of them assented thereto and that they were associated in the conduct of the business."

It is clear that, whatever right the corporation may have had to practice dentistry in New Jersey, its home, it had no such right in Pennsylvania, and that whatever the defendants did there in the way of practicing dentistry, they did as individuals and not as stockholders. There was here no question of holding them liable as partners for a liability incurred by an existing corporation in which they were stockholders, for they were sued directly as tortfeasors, and not as stockholders, liable as partners, for a claim previously established against the corporation, for which it could not be made to respond, by reason of its insolvency.

There remains but one other authority cited by the court in the Cunningham case—*Taylor v. Branham*, 35 Fla. 297—as sustaining the doctrine of that decision. There the defendants, after becoming incorporated in Tennessee, *went to Florida* and organized there by electing a board of directors and a president and general manager, without becoming incorporated under Florida laws, "and that they assumed to conduct here, in their corporate capacity, the business of planting and cultivating hedge fences, for which they had been incorporated in Tennessee, and that the work and labor sued for *was done for them in* and about the conduct of that business."

That is all there is to the case. The defendants sued were running the business, though in the name of a foreign corporation not domesticated in Florida, and the work was done for them, and not for a corporation which, so far as the state of Florida was concerned, was non-existent.

It thus appears that (1) the only Tennessee authority relied on in the instant case is a case in which the defendants, natural persons, were found and served within the court's jurisdiction, that the board of directors and stockholders met at the office it maintained there, and the corporation kept its seal there; that is, it was its principal, if not its only office, and that the work sued for was "*done for them*," i. e., the defendants; (2) that in only one of the cases there cited (*Taylor v. Branham*), were stockholders held liable for debts incurred in the name of a foreign, undomesticated, corporation, that they were residents and participated in the conduct of the company's business and that the work sued for "*was done for them*," i. e., the defendants on whom service of process had been had in the court's jurisdiction; (3) that in the Pennsylvania case there cited, the defendants were held liable as partners because they could not, under the Pennsylvania law, prac-

tice dentistry as a corporation, and not because they had not domesticated their New Jersey corporation in Pennsylvania, and it was affirmatively found that the defendants were, *not merely stockholders*, but the active managers of the foreign corporation and fully aware of its operations.

Of course there is a distinction, too obvious to deserve mention, between the case of a stockholder in a foreign corporation which has not taken the designated steps to become domesticated, and the case of one who acts as agent for such a company, or an officer or director of a corporation without corporate power, because of its failure to comply with the statutes, whether of its own domicile or of a state to which it seeks admission, or the case of persons who assume to act as a corporation without taking the necessary steps to become incorporated. In both of these cases the actor is held liable because he pretends to represent a non-existent principal, whence the contract becomes his contract.

A case without precedents, saith my Lord Verulam, is like a man without ancestry, and that seems to be the situation of the Cunningham case, if we overlook the facts of the case, so lightly indicated, but reasonably inferable—that the defendants were the real actors, and there being no such corporation, in Tennessee, as they pretended, they became liable to the plaintiffs in lieu of the corporation for the debts they incurred in its name. Yet that case is the only precedent in Tennessee for the present holding of the Tennessee court.

Nor are the authorities from other jurisdictions, cited in the instant case, more persuasive than those cited in the Cunningham case. They are:

*Taylor v. Branham*, 35 Fla., 297; 17 So. 552, 39 L.R.A. 362; 48 Am. St. R. 249; *Bigelow v. Gregory*, 73 Ill. 197; *Loverin v. McLaughlin*, 161 Ill. 417; *Hill v. Beach*, 12 N. J. Eq. 31; *Lasher v. Stimson*, 145 Pa. St. 30; *Guckert v. Hacke*, 159 Pa. St. 303.

The first of these cases was also cited in the Cunningham case and has been already considered.

In the New Jersey case five persons entered into an agreement to assume a contract by one of their number for the purchase of a quarry in New Jersey, to contribute equally to the purchase money and to an operating capital, with an agreement against any party disposing of his interest in the venture without the consent of all. There was no agreement to incorporate, but the parties did undertake to incorporate under the laws of New York—this attempt at incorporation was held by the Chancellor invalid, for reasons which are not clear. "*They are not a foreign corporation*, for it is perfectly manifest, upon the face of their proceedings, that their attempted organization under the general law of New York respecting corporations was a fraud upon the law of that state." Such being the case, it is manifest that there could not arise any question of failure to comply with the laws of New Jersey relating to the admission to that state of foreign corporation, nor is there in the opinion of the chancellor any reference to such laws. The parties, therefore, stood before the court in the position of persons who unite their resources for a common purpose, without providing that security against liability for the concern's debts beyond the amount invested by each in the enterprise, which incorporation furnishes. Such persons, at the common law, the civil law and, we presume, the Code of Hamurabi, are liable for each other's acts in the joint enterprise and for all the debts thereby incurred. All that the

court says on this subject, while perfectly sound in law, would seem to be rather in the nature of *obiter*, since the main purpose of the bill, filed by one of them, after the property had been foreclosed under the purchase money mortgage, was to secure his proportionate part of the residue left in the hands of the sheriff and satisfaction out of the share of another of a debt to him from that other, as also satisfaction of a debt of the concern to him—all of which objects would seem to be properly sought, whether the concern was a corporation or not.

But we may leave this case with an acceptance of the chancellor's statement that there was *no corporation*, so that it can not by any possibility be authority for holding that a stockholder in a real corporation is liable as a partner for its debts, because of the failure of its officers to take the necessary steps to secure its domestication in a foreign state in which it assumes to do business.

In *Bigelow v. Gregory*, five persons associated themselves together by an informal written instrument "for the purpose of carrying on a manufacturing business under authority" of the Wisconsin corporation act, but failed to publish their articles of incorporation, as required by that act, or to file the same with a designated officer. It was held that there was no corporation and they were, therefore, liable as partners.

In *Lasher v. Stimson*, the Pennsylvania court held that an *agent* who does business in the name of a foreign corporation not admitted to the state, is liable, not for its liabilities generally, but for those which he incurred in the name of the corporation. There is nothing to show that the agent was a stockholder in the corporation, and his liability is clearly and unmistakably rested on the fact that he made contracts in the name of a corporation, which, as far as the state of Pennsylvania was concerned, was non-existent, and, under a familiar and elementary rule, there being no such person as he professed to represent, the debt was his own.

As to *Loverin v. McLaughlin*, 161 Ill. 417, it seems sufficient to say that under a statute of Illinois an officer or director who assumes to exercise corporate powers, without complying with the provisions of the act, is held liable "for all debts and liabilities made by them, and contracted in the name of said pretended corporation," and the defendants having violated this statute, were accordingly mulcted for the debts so incurred, there being, of course, no preference to whether or not they were stockholders in the projected corporation. They had violated the law and were obliged to undergo its penalty—in paying the debts incurred by them in the name of the corporation.

*Guckert v. Hacke*, 159 Pa. St. 303, holds that one who dealt with a business concern *without knowledge that it was or professed to be a corporation*, is entitled to hold all persons concerned therein as stockholders, liable for a debt incurred in the course of the business, where the would-be corporation has failed to comply with the statutory requirement as to recording its charter. The court conceded that "had plaintiff dealt with defendants as a corporation he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter," and cite *Spahr v. Bank*, 94 Pa. St. 429; to this very sound rule. Now the creditors of the Dayton Company dealt with the company as a corporation and, under



the very language of this decision, they were estopped from claiming against the persons doing business as such corporation in any other capacity, i. e., as partners. The Pennsylvania court, on the facts before it, held that the plaintiff was not advised of the claims of the persons with whom he dealt to be a corporation, and dealt with them on the supposition that they were a partnership, and was, therefore, entitled to take advantage of the fact that they had not complied with the statutory requirements as to recording their charter—clearly a different case from the instant case.

Thus it would seem as if there were no precedent in any jurisdiction for the holding of the Tennessee court, that the stockholders of a foreign corporation which undertakes to do business in that state, without complying with the laws of the state with reference to the admission thereto of foreign corporations, are liable as partners for its debts, without reference to whether they took any active part in incurring those debts—unless, perhaps, its own previous holding in the Cunningham case furnishes such a precedent. The scope and effect of such a holding are so momentous as to require the fullest inquiry into its soundness, both upon principle and authority.

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THE CONTINUED ARTICLE BY HON. GEORGE F. ORT OF THE CHICAGO BAR ON "MEDICO LEGAL ETHICS AS APPLIED TO CHIROPRACTIC" IS NECESSARILY OMITTED FROM THIS NUMBER; IT WILL APPEAR IN THE JANUARY-FEBRUARY NUMBER OF THE LAWYER AND BANKER.

# BROKERS' COMMISSIONS

By C. W. Swartzel of the Cleveland, Ohio, Bar.

1. "Is a real estate broker entitled to his commission upon the sale of real estate, when he has procured a purchaser with whom the seller enters into a binding contract of sale?"

The case of *Fish v. Bassett*, the Cuyahoga county Court of Appeals, decided this exact question in favor of the agent.

The opinion rendered by Dunlap, J., and concurred in by Judges Grant and Washburn, says:

"We think it almost universally held that in the absence of express covenant to the contrary upon the part of the broker, that he is entitled to his pay when he produces a party with whom his principal makes and enters into a binding contract of sale. The broker should not, in our opinion, suffer, when the lack of enforcement of the contract is due entirely to a willingness on the part of the contracting parties to forget the whole transaction, forfeit the earnest money and go along as if nothing had happened.

"The cases in which any different rule seems to be indicated, will usually be found to turn upon some peculiar provision of the contract, employing the broker, or some incident connected with the sale, making the enforcement of the contract of sale impossible."

This would appear to be the law of Ohio, were it not for the fact that in at least three other Court of Appeals cases, in districts other than Cuyahoga county, a different opinion has been expressed, although the facts in but one of these three other cases required a holding on the point involved.

In *Thompson v. Dorman*, 26 C. C. (N. S.), 191, decided in July, 1914, in Hamilton county, it was held that a petition is insufficient where the agent failed to allege and prove that the purchaser was *able* to buy on the terms authorized, notwithstanding the fact that the contract of sale was in writing and is validly unquestioned on a demurrer to the petition.

In February, 1916, the same court, in *Laudt v. Furer*, 26 C. C. (N. S.), 213, adheres to the same view, and the syllabus of the case reads:

"Recovery of a commission for sale of real estate can not be based on the fact alone that the proposed purchaser signed the contract of purchase, but it must also be made to appear that he was able and willing to complete the purchase and make the payments stipulated in the contract."

In denying the agent his commission in the last case, the ground of decision was this:

"The claim for a commission is unenforceable in the instant case for the further reason that plaintiff concealed from the owner of the property the fact that the proposed purchaser would not be able to take the property until he had sold certain other property the title to which was so clouded as to render a sale extremely improbable."

On this point, the opinion says:

"If they (the plaintiffs) were acting as the agent of the defendant and withheld this information from their principals, and induced them to sign

the contract, it was a breach of trust, if not fraud, and alone should prevent the plaintiffs recovering in this case."

It is clear, therefore, that this case is not an authority on the precise point under consideration.

In the very recent case of the *Howard Company v. Morris Arnoff Realty Company* (C. A. 3066, Toledo judges sitting in Cuyahoga county court of appeals), the contract of purchase was never signed in binding form by the seller. Counsel argued the case and the court seems to have assumed that the contract was signed by both buyer and seller, but the court says:

"On the trial of the case, the issue was whether the purchasers were ready, willing and able to carry out the terms of the contract. It was conceded that they were ready and willing but it was denied that they were able to carry out the terms of the contract \* \* \*. It is not enough to prove that the proposed purchaser had sufficient assets to equal the amount of the purchase price. It is incumbent to show further that such assets are available to meet the requirements of the contract."

In this case the agent's undertaking was simply "to find a purchaser for defendant's 6-suite apartment" at a price of \$60,000.

The Supreme Court of Ohio has never been called upon to decide the point. There is, therefore, a fair conflict of judicial opinion, if not a conflict of authority in Ohio, on this important question, and a situation exists which would, in all probability, induce the Supreme Court to take jurisdiction of a proper test case, so that this question might be settled for Ohio. The view in favor of the broker's right to recover his commission, when a purchaser has been procured by him, and the vendor has accepted the purchaser and entered into a binding contract of sale with him, and that the agent's right does not depend upon the carrying out of the contract of sale by the purchaser, is sustained by the great weight of authority in this country, is more just and is supported by the better reason.

It is, however, held in some jurisdictions, that a real estate broker is not entitled to his commission for selling land until the sale is actually consummated by a transfer of title, and that, therefore, where a purchaser refuses to complete his contract of purchase, the broker can not collect his commissions, notwithstanding the contract might be enforced by the vendor. In England the courts seem to deny the right of a broker to recover commissions, where the purchaser fails to comply with a binding contract of sale and purchase. 11 Amer. & English Ann. Cases, page 787 note.

It is neither wise nor safe to predict what our Supreme Court would hold, and the situation calls for greater care in drawing the broker's employment contract, and the conflict of judicial opinion among the judges of the courts of appeal in Ohio, places peculiar emphasis upon the wisdom of reducing such contract to writing and inserting

therein the stipulation that "commission shall be considered earned when the broker procures a purchaser with whom the seller enters into a binding contract to purchase."

It is the writer's personal view that our highest court would adopt the view of Judge Dunlap in *Fish v. Bassett*, which is supported by the courts of last resort of Indiana and Massachusetts in well-considered decisions.

The sole inquiry is, has the broker done just that and all that, which the owner employed him to do; just that and all that which he undertook to do? *Leete v. Norton* 43 Conn., 219, 225; *Odell v. Dozier*, 104, Ga., 203, 204.

Courts adopting the majority rule in favor of the broker, after he had produced a binding contract with the purchaser, proceed upon the ground that the vendor is not required to accept a purchaser without a reasonable opportunity to inquire and satisfy himself in relation to the purchaser's ability; but where he does accept the purchaser, uninfluenced by fraud or misrepresentation, it is a determination by him of the purchaser's ability to perform his contract, and such acceptance should estop him from denying such ability as against the broker's claim for commission. The vendor in such case takes the responsibility of accepting the proposed purchaser, and in the absence of express contract, need not see that the purchase money is paid, nor enforce the contract of sale. *Moore v. Irwin*, 89 Ark., 289. *Love v. Miller*, 53 Ind., 294. *Williams v. Fraker*, 129 N. E. Rep. 413. (Appellate Ct. of Ind.) *Fox v. Ryan*, 240 Ill., 391. 44 L. R. A. 616 Note.

In *Waddle v. Smith*, 58 Ind. App., 587, a consummated sale is defined as "one consummated by such a contract as will be enforced by the courts, if enforcement be demanded."

To the same effect is *Rice v. Mayo*, 107 Mass., 550 and *Ward v. Coff*, 148 Mass., 518. If the vendor is doubtful of the buyer's ability to carry out his contract of purchase, he may accept a contract conditionally, and agree to sell, provided the purchaser proves able to perform its condition. *Flynn v. Jordal*, 124 Ia. 457.

In Ohio, the case of *Pfans v. Humburg*, 82 O. S., 1, has been cited as an authority for the rule that the agent must, to recover, allege and prove that the sale was consummated in the sense of transfer of title and payment of purchase price, but the case does not go further than to decide that a completed sale is not made where no enforceable contract is entered into between the vendor and the vendee.

Our Supreme Court cited the case of *Wilson v. Mason*, 158 Ill., 304-311, wherein the point actually decided was, that a contract to sell land against which the vendee can successfully plead the statute of

frauds is not a valid contract, for the procuring of which a broker employed to sell the land may recover his commission. The contract in *Wilson v. Mason* was one by executors wherein but one executor signed for all and the proof failed to show authority from the co-executors and no power by will to purchase.

In the more recent case of *Fox v. Ryan*, 240 Ill., 391, the court adopts the rule that the broker is entitled to his commission when he has furnished a purchaser with whom the principal enters into a valid contract, even though the purchaser afterwards fails to perform it by reason of his inability to complete the purchase.

In *Pfanz v. Humburg*, above cited, our Ohio Supreme Court says: "But the agent should go far enough to find a ready, able and willing purchaser and bring him and the owner together so that they may enter into a binding contract of sale and purchase."

## 2. THE BROKER MUST BE THE PROCURING CAUSE OF THE SALE.

The rule of law as to procuring cause requires the agent to show that the buyer was induced to apply to the owner through the means employed by the broker. The intervention of another agency may break the casual connection between the agent's efforts, or means employed by him, and the resulting sale, and where this occurs, the agent is held not to have procured the sale. *Platt v. John* 9 Ind., 58.

The broker may, however, be in law the procuring cause by merely introducing the intended vendee to the seller, *provided*, such introduction or disclosure or initiatory step be the direct or efficient cause which brings the minds of the buyer and seller to an agreement on the terms authorized.

The sale need not be brought about by the efforts of the agent to the exclusion of the other causes, but in determining by whose agency the sale was effected, the law regards only proximate and direct causes, not remote causes. *Wylie v. Marine Nat. Bank*, 61 N. Y., 415.

In the case of *Page v. Lippert*, 13 O.C.C. (N.S.), the court held: "It is not indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser; but in such cases, it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker."

See *Pierce v. Thomas*, 4 E. D. Smith (N. Y.), 354, 355.

And the broker may even be the procuring cause though he never saw or personally communicated with the purchaser, and never knew of the negotiations until after title was conveyed, as in *Page v. Lippert*, just cited a direct connection between Page's advertisement and the buyer's knowledge of the property was shown, although two other parties intervened to convey such information. In other words, the

purchaser was induced to apply to the owner through the means employed by the broker and in such case, he "should have the benefit of the natural results of his deliberate acts."

While the prevailing rule is that the broker has earned his commission if he procures a binding contract of sale between the vendor and purchaser, yet this rule does not mean that the broker *must* in all cases, procure such a contract of sale *before* he earns his commission.

So Ohio cases seem to hold that the broker has earned his commission when he procures a purchaser ready, willing and able to buy the property upon the terms authorized, or when the agent brings parties together who afterwards agree upon terms.

In the absence of express agreement, making it the agent's duty to secure a binding contract of sale, such duty does not devolve upon the agent. Practically, however, where the broker does undertake to secure such a contract, it is vitally important to accomplish fully this result. Otherwise, if the purchaser fails or refuses to perform as agreed, the broker will necessarily have to assume the burden of proving the purchaser's readiness, willingness and ability.

Where, however, the owner himself undertakes to draw or prepare the contract of sale, his failure to incorporate provisions which make it binding, does not militate against the agent's right to collect his commission. *Heintz v. Boehmer* (1897), 4 O. N. P., 226.

### 3. BROKER'S AUTHORITY.

#### (a) *Scope—Power to make contract of sale.*

Authority in general terms to find a buyer does not carry with it implied authority to enter into a contract of sale binding upon the owner. "It is the settled law of Ohio that a real estate agent is without authority to execute a contract of sale which shall be binding on one who places real estate in his hands for sale, unless such authority is specially conferred."

This rule was announced in *Weatherhead v. Ettinger*, 78 O. S., 104, wherein the court in its opinion says:

"It is in accordance with common understanding that one soliciting the services of a real estate broker, when nothing more appears, reserves to himself the power to conclude the sale."

In *Spengler v. Sonnenberg*, the Supreme Court held:

"That if an agent, acting under express authority to enter into a written contract for the sale of land, makes a contract for his principal, which includes terms not authorized, the agreement is void and its performance will not be enforced." 88 O. S., 192.

In this case the court also held:

"That while the weight of authority seems to sustain the proposition that special authority to an agent to enter into a written contract, may be verbally conferred, the proof must be clear and decisive, not only of such

parole agreement, but that the agent had authority to make all of the terms for his principal which he includes in the written contract."

Where the owner instructs the broker to sell his property, naming all the essential conditions or terms upon which the sale is to be negotiated, including provision as to commission, the broker will, in many jurisdictions, be held to be authorized to enter into a binding contract of sale, upon the ground that in such case the intention fairly appears that the agency was to be more extensive than the ordinary authority to find a buyer.

It is highly advisable in Ohio, however, to have not only the price fixed in the agent's employment agreement, but full terms of sale, including taxes, stipulation as to title, rentals, unearned insurance, possession and the date for transfer and settlement, for Judge Price reflects the attitude of our Supreme Court in *Laws v. Schmidt*, 80 O. S., 121, where he says:

"The terms of employment should not be enlarged and made to create a liability not contemplated in the contract."

It is important to the buyer, as well as the agent, because where the agent has power to bind the seller in writing, the buyer can demand specific performance of the contract by the seller; otherwise not.

(b) *Termination or Revocation of Authority.*

Provided the principal acts in good faith and not for the purpose of evading liability for the broker's services, the authority of the broker may be terminated at will by giving notice, unless the contract of employment is coupled with an interest (other than commission) or is given for a valuable and independent consideration. Good faith on the part of the principal, however, in revoking the agency before the expiration of the time allotted, is absolutely required.

Where the contract gives the broker a certain time within which to effect a sale, the principal can not defeat his right to a commission by revocation, if the broker secures a purchaser before the time limited, as a result of efforts commenced before the revocation.

If the negotiations between the principal and the customer were induced by the broker before the agency period expires, and continue uninterruptedly (the casual connection being unbroken), after the expiration of the time allowed the broker, and a sale is made, of which the broker is accordingly the procuring cause, he is entitled to a commission, although the sale is not closed until after the expiration of the time limited. 19 C. Y. C., 254, 255.

(c) *Damages for Breach of Contract.*

But, if the agent has, in good faith, expended money, time or labor upon the business before notice of revocation, the owner, on revoca-

tion, becomes liable to the broker for the damages occasioned by termination of the authority in breach of the contract. The measure of such damages would be indemnity to the agent on a *quantum meruit* and not for full commission as such unless he shows that he had procured a purchaser able, ready and willing to buy within the time specified, and before revocation.

(d) *Exclusive Agency Privilege.*

An exclusive agency, supported by a consideration independent of the commission for effecting the sale, entitles a broker to commission on any sale made independently by the principal, (if the owner's right to sell be in terms excluded), or if the sale is made through the efforts of another broker during the time specified. And this is true, although the exclusive agent's efforts did not contribute toward the sale.

According to the weight of authority, however, a contract giving a broker an exclusive agency, without negating or excluding the right of the owner himself to sell the property, is not violated by the owner's selling to one not a customer of the broker. It seems, then, that making the agency exclusive in terms, is not enough to take away an owner's right to sell his own property. He can only be deprived of such right, either by express words of exclusion or words from which such exclusion may be necessarily implied.

In other words, the right to sell in the agent must be exclusive and not merely the agency granted.

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#### THE VALUE OF PROVERBS

"The chief standard which it is said the court ignored is, 'Let well enough alone.' It is said the proverb springs from the good sense and experience of mankind, and is a caveat which applies to courts as well as to individuals. This is not the place to discuss at length the subject of secular proverbs, those oracular truisms which, as Edward Fitzgerald said, we have learned from the lips of grandmother and nurse, and have written in our copy books, but which we understand only as the years furnish occasion for practicing or experiencing them. Many proverbs abound in good sense, energy, and courage, compactly expressed, and help 'to drive the nail home.' Some are found to be nearly as impractical as the attempt to 'make a silk purse out of a sow's ear.' Others are ambiguous and capable of disastrous application, such as 'stuff a cold and starve a fever.' Others are untrue, and would smother the fire of aspiration in the ashes of sordid realization. Nothing kills like possession. Progress depends on dissatisfaction with achievement, and 'a bird in the hand' is not 'worth two in the bush.' Very often proverbs offset each other. The one invoked is counter-balanced by 'nothing ventured, nothing gained,' and is the specific anodyne of the sluggard, the slacker, and the conservative, agitated by the call to action, to duty, and to improvement." (Judge Rousseau A. Burch in *Cook vs. McCabe*, 108 Kan. 172, 194 Pac. 633.)



# CITY SURVEYING—ITS PROBLEMS AND IMPORTANCE

(By A. Malkin, Civil Engineer, Detroit, Mich.)

In city surveying there are two distinct phases: The first is the original establishment of property lines and the second, the re-establishment of the original property lines.

In establishing the original property lines subdivision layouts are made which consist of the division of farm land into blocks accessible on all sides to streets or alleys. These streets and alleys are deeded to, and become the property of the municipality in which the subdivision is to be included. These blocks are further subdivided into smaller parcels each abutting on a street. The parcels are called lots and the dimensions of a lot measured along the street it abuts are termed its frontages.

The boundaries of blocks which are also the boundaries of the public streets and alleys are established by the placing of monuments at each and all of the breaks in the boundary line which is at the point of intersection of the two straight lines forming the break. The subdivision of the block into lots is done in a similar manner. The types of monuments used are of stone, iron and wood.

The most common type of monument used is the wood stake, one to two inches square and from eighteen to twenty-four inches long. In many instances round iron pipes from one to one and one-half inches in diameter are required to be used for locations of street corners or block boundary lines.

When the subdivision has been staked out a plat showing the dimensions and locations of principal monuments and sizes of lots together with the bearings of streets and alleys is filed with the proper authorities of the state, county and municipality in question. When approved, the layout goes on record and marks the completion of the first phase of city surveying.

The second phase begins where the first leaves off. In attempting to re-establish the original property lines, it is important to note that the controlling factor is the location of the original monuments witnessing the boundary lines regardless as to whether they agree with the dimensions of the recorded plat plan.

To understand the principal problems confronting the engineer in this phase of surveying, it is well to analyze the growth and development of a city. From a surveyor's viewpoint a city may be looked upon as the outgrowth of an original farm settlement formed along a highway which acts as its only or principal street. To this nucleus the continuous additions of subdivisions form its growth. While the city in its endless development has its corresponding variations in the care with which new subdivisions are incorporated, we can safely for our purpose divide it into two stages.

First, when the municipality is too small to supply the proper supervision for the purpose of examining and correcting the proposed new subdivisions; second, when the old more or less haphazardly built up city becomes sufficiently important to afford competent men to pass on its proposed additions (and in many large cities there is a city planning commission which

arranges all proposed new subdivisions to facilitate the future expansion of the city).

During the first period of a city's growth, there is a very important factor which tends to upset if not nullify the work of the original layout of the various subdivisions. That factor is the relative cheapness of property when measured by the standard of foot frontage. This comparative lack of value causes laxity on the part of those who are the pioneers of the city. Very few if any of them would pay for the services of an engineer if he was at all to be conveniently procured.

In a number of non-monumented American cities, where all traces of original monuments of a subdivision are gone (and that is only a short time in the history of a city) there are two main sources by which the engineer is expected to read the past. The first is the public streets and alleys. The second, existing old buildings some of which date to the time when the original monuments must have been existent.

The boundaries of city streets may be determined from the curbs which separate the roadway from the sidewalks. This roadway is, whenever possible, located in the center of the street, leaving on either side equal widths for sidewalk purposes. When adjoining subdivisions do not provide for continuous straight streets and when the variations are small, the city lays its curbs so that the roadway is kept straight, leaving unequal distances between curbs and street boundary lines. Thus any reference that might have been of some use in locating the block boundary lines from curbs is destroyed. The location of existing old time buildings would have been a proper key to the situation were it not for the carelessness of the pioneer city builders in whose interest the law of adverse possession is in force.

In addition to the above two causes which contribute to the complications of re-establishing boundary lines there has been a third and most essential condition which unfortunately reflects also upon the original surveyor of the subdivision. Up to very recently and even now in only a few states surveyors are required to be registered by the state which tests their ability before unloading them upon the public. In the past, therefore, there were two grades of men in practice: the intelligent and reliable practitioner who would not render his services unless the compensation enabled him to give it the necessary care and employ the proper help. However, the demand of real estate operators for lower charges who did not grasp the importance of a correct layout as a duty to the future property owner and the city as a whole caused some men unfit by their education and experience to enter the field of surveying. In many instances while the principal of a firm of engineers was a man of proper training and experience he was forced to employ an organization below his standard due to the low compensation received.

These inaccurate surveys did much towards the creation of what is now termed discrepancies which are shortages and surpluses according to the actual measurements in the field as compared with the dimensions of the original recorded plats.

As an illustration of the above we have recently been called upon to survey seven adjacent lots which form a part of an old subdivision in the outskirts of the city. On record were two survey plats made subsequent to the original layout of the subdivision. These plats did not agree with each other

nor with the original and all three had practically no relation to the actual measurements in the field. Upon investigating the situation we found that the ground was first staked out in accordance with a proposed layout which was subsequently changed before it was placed on record. A second staking out was made in accordance with a new layout which was duly recorded. However, the owner of the subdivision refused to pay for the removal of old stakes relating to the first survey so that at the present time there are two sets of stakes causing confusion in determining the property lines.

It can readily be seen that when the city lays its streets according to this cross information and when this section is built up and all possible reference to old stakes destroyed, it will require a superman to determine the boundaries of the property and yet there seems to be no attempt to correct the description in the various abstracts of title to the property at a time when there is yet a possibility of straightening the matter out.

Another instance where a shortage of seven inches in a block caused a great deal of trouble including court action and financial loss to the builder was brought to us for final certification.

According to the description in the abstract covering this property, a set of plans were drawn by an architect for an important apartment building which was duly approved by the city authorities. The property in question is located on a corner so that the foundation was laid out in relation to the two streets and the rear alley. When the footings were completed an injunction was granted the adjacent property owner restraining the builder from encroaching on his property. A survey was made and it was found that there is a shortage in the block and in view of the fact that all existing buildings and fences indicate that the lots were all measured from the other side of the block, this corner property owner was forced to take what was left between the last property line and the street line.

In the above case if the abstract during its various examinations of title would have had its description of property corrected and certified to by an engineer it is probable that the shortage might have been traced and recorded as belonging to some other lot. In any event, the present owner would have known exactly what he was buying, paying only for the actual frontage instead of an imaginary one, and would have finally been spared a great deal of inconvenience and loss of time and money.

In a recent survey of an important business frontage in a small town near Detroit, we found the block to be two feet longer than the total recorded frontage for that block. In this instance, it was an interior lot, one side of which was bounded by a building whose frontage measured the total recorded frontage to the corner while on the other side the lot line was clearly determined by an old brick building located on the lot in question. It was evident that the building on the lot in question was laid out in relation to one end of the block whereas the other building assumed the other corner as correct, leaving a surplus of two feet which no one can legally claim but may be occupied and used by the owner of the vacant lot in question, without interference by adjoining property owners because they have no ground for court action. In this case the owner is the gainer but whether gaining or losing the fact that the description in the abstract is not reliable depreciates from the value of the abstract.

Another view of the importance of a survey is the general information furnished by a surveyor as, for example, the proposed condemnation of property. Recently, in two similar cases in different parts of the city the lack of information of the proposed condemnation for the purpose of street widening caused great financial loss to the builders concerned. In both cases plans were drawn for an ordinary store and apartment building where the certainty of its approval by the building department of the city caused the builders to complete basements for the structures prior to obtaining a building permit.

In the city of Detroit in cases where the condemnation of property is only in its proposed stage and carries no certainty of its being approved, the building department will issue a permit for the erection of a building upon the property at the risk of the builder.

The builders in both of these cases found it too risky to proceed according to original plans so that whatever could be salvaged of the material in the basement walls was used for the new structures built according to new plans assuming the proposed future front property lines.

It is a fact that so far in the examination of abstracts at the time of transfer of title no attempt has been made to bring the description of the subject property to date simultaneously with its legal ownership.

Even if there were no new buildings erected on the property since its last transfer a survey would show whether the adjacent property owners did not encroach on the property in question which would require legal action to cause their removal.

It is gratifying to note, however, that a number of our financial institutions and all the way down to the smallest property owners and builders are beginning to realize the importance of establishing the accurate boundaries of their properties. The cost of the service is usually so very low as compared with the safety and peace of mind it affords that it leaves practically no case where it might or should be dispensed with.

The present practice of requiring surveys of vacant property in the case of loans on new structures and further surveys showing the location of buildings in relation to property lines for both new and old structures on which mortgages are issued is well expressed by Mr. N. M. Gross, Vice-President of the Federal Bond & Mortgage Company, one of the foremost first mortgage houses in the state of Michigan:

"We consider the survey of a piece of property one of the most important essentials in the safeguarding of our mortgages; in fact, we require two surveys under each loan we make. The first survey is of the real estate itself—the second survey shows the building within the lot lines. We have always adhered strictly to this policy."

In a reply to our request, Mr. J. L. Hirschman, associate to Mr. Albert Kahn, prominent architect and engineer of Detroit writes:

"Referring to your request from us for an expression as to the necessity of a survey in connection with building construction work. Such an inquiry is merely putting in other words whether it is necessary to know accurately the location and the size together with the levels of a piece of property in order to plan a building to be erected on the same. We believe the condition speaks for itself."

The H. G. Christman & Company, prominent Detroit builders of wide experience, has this to say:

"In our opinion a survey is a cheap form of insurance against damages which may arise from improper location of a structure. In several cases where we have had contracts to add to existing buildings, we have found the existing buildings to be encroaching on adjacent property. Such conditions if not properly safeguarded against, may be the cause of considerable financial loss to the contractor."

Mr. F. J. Beyer, Assistant Cashier in charge of real estate mortgage loans of the Bank of Detroit, expressing the policy of the bank on the question of the importance of surveys to the mortgages, clearly emphasizes the most important point:

"The Bank of Detroit is not satisfied merely with having the abstract of title brought down to date in connection with safeguarding its mortgage loans. While the abstract gives assurance as to the correct legal ownership, it does not vouch in any manner for the description of the subject matter covered by the abstract. Too often the piece of property itself, which is the security of the loan, is found, upon having it surveyed, to be materially different from what is called for and described in the abstract of title. Consequently, we have learned by experience to rely not only upon the abstract of title to give us our legal protection but equally as important upon a competent survey of its subject matter to give us our corporeal rights."

The Union Trust Company, through its Vice-President and Real Estate Officer, Mr. B. H. Manning, in charge of the real estate and mortgage departments which handles a great volume of loans on behalf of a prominent eastern insurance company sums up the situation in this very clear manner:

"The survey furnishes a means of accurately checking the description in the mortgage or other conveyance; gives assurance that the buildings appraised are actually situated upon the property covered by the mortgage; and in addition shows whether or not existing building restrictions and the building code have been violated. We have found it not only highly advisable but almost essential to insist upon a survey in connection with mortgage loans."

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#### LAW BREVITIES

According to an ancient rule of the common law, the contracts of infants were divisible into three classes,—absolutely void, voidable, and valid. Void when necessarily prejudicial to the interest of the infant, valid when manifestly for his benefit, and, when of an uncertain nature as to prejudice or benefit, voidable only. (6 Brit. Rul. Cas., 115 note.)

The classification of infants' contracts as "void" or "voidable" is probably attributable to the looseness with which the courts have spoken of infants' contracts as being "void" when they meant only that the contracts were voidable; or, in other words, not enforceable against the infant. As has been frequently pointed out, it is for the benefit of the infant to hold his contract not void, but voidable; for if the contract be voidable merely he can secure the advantage of a good bargain and relieve himself if it be a bad one; while, on the other hand, to hold it void might deprive him of the benefit of an advantageous contract; and if the contract of an infant is held to be absolutely void, the adult party contracting with him would be equally discharged. The modern tendency is to regard all contracts of an infant either as valid, or voidable at his election. (6 Brit. Rul. Cas. 115, 116 note.)

# SOUTHERN STORIES

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## DOUBTFUL

An old negro woman stood by the grave of her husband and said mournfully, "Po' Rastus! I hope he's gone where I 'spec he ain't."

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## WHAT'S THE DIFFERENCE

A poor kid was being taken to California for his health, and was only half conscious most of the way. As the train came to a stop, after a long sultry day, he sat up and said, "Mother, ain't this hell?"

"No, dear," replied his mother, "this is Los Angeles."

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## HIDDEN ASSETS

"My face is my fortune," said a New Orleans peroxide blonde to a casual acquaintance.

The young man gave her face a close scrutiny, then he shook his head doubtfully.

"Madam," said he, "I believe you are concealing some of your assets."

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## NO LIGHT NEEDED

"Mother, can father eat electric lights?"

"Why no, my child, why talk so foolish?"

"Well, then, Mother, can the new maid see in the dark?"

"Why, I don't see how she could."

"Well, she told daddy in the hallway last night that he needed a shave."

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## NO POST-GRADUATE COURSE

Mose was applying for divorce.

"Mose," said the judge, "are you sure this man made love to your wife?"

"Well, yoah honah," says Mose, "Ah come home the othah night and found dat triflin' niggah settin' right plump beside mah wife wif his arm around her. Well, ah nevah got mad, jedge, ah nevah pulled mah gun, and ah lef mah razor in mah shoe, but when dat woman says, 'Mose, draw up yoah chair and take a few lessons,' ah decided right den and dere ah can't stan' dat woman no longah."

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## MA HASN'T SPOKE TO DAD SINCE

One cold night in December;

It was seventeen below,

Dad left his bedroom window up

And his bed got full of snow.

But when the storm was over

And the stars began to shine,

Dad warmed his tootsie wootsies

On the south side of ma's spine.

# A PROPOSED FEDERAL LIS PENDENS ACT

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By Frank C. Hackman of the Seattle, Washington, Bar

In past issues (April and June, 1922) of *THE LAWYER AND BANKER* the characteristics of statutory notices of lis pendens were discussed, and it was pointed out that those acts had no application to judicial proceedings in Federal courts. This article is not a review of those subjects, but is a discussion of a bill that was drafted some time in the past for the purpose of providing a Federal notice of lis pendens system, which bill has been approved by some state bar associations, and its passage urged upon Congress by them.

For a thorough understanding of what will be said, it must be borne in mind that the object of state notice of lis pendens statutes is to assimilate somewhat of the original doctrine of lis pendens as to real actions to the recording system for land titles; or, in other words, to create a record affording a definite and convenient means for the ascertainment of a lis pendens, and to abolish the hardship of the common law rule which operates to charge a person with notice of a pending action even in cases where there is no way by which he can inform himself thereof.

Since the jurisdiction of a Federal district court is not confined to a county, but extends over a district that usually embraces several or more counties, the pendency of an action in a Federal court operates as a lis pendens throughout the district without regard to county lines. And, under the law as it now stands, notice of the pendency of an action touching title to land in a Federal court does not have to be given in any manner, nor made a matter of record with other land title records in the county wherein the real property involved is situate. Hence, one who would inform himself as to whether or not there is any litigation pending in the Federal court touching land he is about to deal with, must examine the files or memoranda of judicial proceedings in the office of the clerk of the Federal district court of the district wherein the land is situate. To change this situation by requiring a notice to be filed in a county office in the county in which the land is located in order to make a lis pendens operative is the object of the bill in question. Unquestionably this object is laudable, but whether or not the bill is adequate to accomplish that object is another question which will be considered in this article.

The Bill in question reads as follows:

"A Bill, to provide for the giving of notice of pendency of suits and proceedings in courts of the United States affecting title to real property.

"Be It Enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"That the pendency in any court of the United States of any action or proceeding affecting title to real property shall not be notice to any persons except parties thereto who have been served with process or have appeared therein, unless notice of the pendency of the action or proceeding be given in the manner required for notice of the pendency of like actions or proceedings in the State courts by the law of the State where such real property is situated: Provided, this Act shall not apply in a State wherein officers whose ministerial services would necessarily be employed in giving such notice are not expressly charged by law with the duty of performing such services; and provided further, this Act shall not apply to actions or proceedings now pending."

In providing for a record notice of the pendency of judicial proceedings in federal courts affecting title to real property, Congress can adopt one of several systems.

It can enact a statute requiring a notice to be given to make a lis pendens effective as to defined actions and persons, and providing the form and manner of giving it. In other words Congress can enact a notice of lis pendens law, independent of any state law, embracing as much of the scope of the original doctrine as it deems advisable, and make it applicable to all federal courts. It can require the notice to be filed or recorded in the office of the clerk of the district court of the district wherein is situate the real property affected. This system, while some improvement so far as the element of notice is concerned over the existing system, obviously would not afford a convenient means for ascertainment of these notices. To effect this latter result a law like the foregoing could provide that the notice be recorded in the office of the recorder of deeds, or other proper county office of the county wherein the land is situate, instead of in the federal court clerks' office, conditioned, of course, that the state require the designated state officer to perform the duty required. An act of this kind would create a federal system of uniform application to all federal courts in all states enacting the necessary legislation to make the act operative, and where this was done it would be operative whether or not the state had enacted a notice of lis pendens act. Being independent of any state lis pendens act, it would not create a system identical with that of a state, except, of course, where the act of a state happened to be similar to the federal act.

Or Congress can adopt another system different from either of the foregoing. It can pass an act adopting the notice of lis pendens acts of the states, and make, in effect, the law of a state a federal law applying to federal courts within that state to the like extent and in the same manner it applies to the courts of that state, conditioned of



course, that the state expressly requires its officers to perform the necessary ministerial acts. This would create an identical system of statutory notice for courts of a state and federal courts therein, in each state enacting the essential legislation, but not uniform in application to all federal courts.

Or Congress can enact a law, such as the Bill in question, unlike either of the foregoing.

The Bill in question would not affect the adoption of state statutes save as to the manner of giving notice. The Bill carves a particular class of litigation—actions affecting title to real property—out of all litigation the pendency of which operates as *lis pendens* under the original doctrine, and would require notice of every action within that class to be given in the manner required as to like actions by the law of the state wherein the property is situate in order to make operative a *lis pendens* as to all persons except parties served with process or appearing. The Bill, however, if enacted, would not be operative in any state not passing the necessary legislation for its execution, and in no case to affect litigation pending at the time of its enactment.

Under the terms of this Bill the pendency in a federal court of an "action or proceeding affecting title to real property" shall not be notice, except to certain parties, unless notice thereof "be given in the manner required" by state law "for notice of the pendency of like actions or proceedings" in the courts of the state. Manifestly this Bill, if a law, would have no force or effect in any state that did not provide for any notice of *lis pendens*. There are quite a number of states where that is so. For example, the Ohio statute reads:

"When the summons has been served, or the publication made, the action is pending so as to charge third persons with notice of its pendency." (*Ohio Code, Throckmorton, 1921, sec. 11300.*)

Yet another situation is to be considered. The *lis pendens* act of a state may not be as comprehensive as this Bill as to the class of actions for which it provides a manner of notice. An example of this is the *lis pendens* statute of West Virginia, which is as follows:

"The pendency of an action, suit, attachment or proceedings to subject real estate to the payment of any debt or liability, upon which a previous lien shall not have been acquired in some one or more of the methods prescribed by law, shall not bind or affect a purchaser of such real estate, for a valuable consideration, without notice, unless and until a memorandum, setting forth the title of the cause \* \* \* shall be filed with the clerk of the county court of the county in which the land is situated." (*W. Va. Code, Hogg, 1913, sec. 5105.*)

This West Virginia act has been held not to require notice of a suit to set aside a deed as fraudulent and void. (*O'Connor v. O'Connor, 45 W. Va. 354, 32 S. E. 276*). And likewise where judgments are docketed, or deeds of trust recorded, or liens otherwise acquired, and

a chancery suit to enforce the same is pending, no notice need be given, the common law rule applying. (*Shumate's Exors. v. Crockett*, 43 W. Va. 491, 27 S. E. 240.)

Where a state act, like that of West Virginia, provides for a notice of some, but not of all, actions affecting title to real property, the operation in that state of this proposed federal act would give rise to some problems. For example, if a state statute fixes a manner of notice only as to some actions affecting title to real property, would the term "like actions or proceedings" in the Bill confine the operative effect of the latter, as a law, only to the actions specified in the state law? Or would the Bill, as a law, while adopting the manner of notice fixed by the state law, disregard the state application thereof, and make that manner apply to all actions affecting title to real property instituted in federal courts in that state?

The lis pendens acts of some states are more comprehensive than the Bill. In California it has been held that a statute requiring the filing of notice of actions affecting title to real property did not require notice of actions concerning possession, and, therefore, did not apply to actions in ejectment. (*Long v. Neville*, 29 Cal. 132.) The present California act in consequence requires notice of "any action affecting title to or the right of possession of real property." (*Fairall's Cal. Code*, 1916, sec. 409.) This act is broader than the Bill.

As another example of divergent terms between the Bill and a state law note the Iowa act:

"When a petition affecting real estate is filed, the clerk of the district court where filed shall forthwith index the same in an index book to be provided therefor. \* \* \* When so indexed, said action shall be considered pending so as to charge all third persons with notice of its pendency." (Suppl. Iowa Code, 1915, sec. 3543.)

Even state acts that are identical with this Bill, in designation of the class of actions affected, differ in other details. The lis pendens act of North Dakota is an example:

"In any action affecting title to real property the plaintiff at the time of filing the complaint or at any time afterwards, or the defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer or at any time afterwards, if the same is intended to affect real property, may file for record with the register of deeds of each county in which the real property is situated a notice of the pendency of the action, containing the names of the parties," etc. (Comp. L. N. Dak., 1913, sec. 7425.)

The Bill would necessitate that notice of the pendency of the class of litigation therein specified be given in order to bind all persons except parties served with process or appearing. The notice of lis pendens acts of various states are not so comprehensive in respect of persons. For example, the Iowa act requires the notice to be given in order "to charge all third persons," and in West Virginia, "a purchaser

\* \* for a valuable consideration, without notice." Hence, the Bill in question, if enacted, would make the record notice essential to bind persons who would be bound without notice under the acts of some states. Those having actual notice or knowledge of the pendency of litigation are generally bound by the rule of *lis pendens* though no notice is given as required by statute. But this Bill provides that notice must be given in order to bind all persons except parties served with process or appearing, and the latter necessarily are persons who have actual notice or knowledge of the pendency of the action.

Since some states do not have notice of *lis pendens* acts, and other states have acts so divergent in their provisions from this Bill, legislative action in various states would have to go farther than merely to authorize and empower state officers to perform the ministerial duties imposed by a federal law of the kind in question in order to make the latter effectual.

A federal law adopting state acts would simplify the situation to some extent. Such a law would resemble this:

When any State requires the filing or recording of a notice in the office of the registrar or recorder of deeds, or other county office, of the counties of that State, or in the State of Louisiana in the parishes thereof, of a pending suit, action or proceeding in the courts of that State affecting title to or the possession of real property in order to effect a *lis pendens*; then the pendency of like suits, actions or proceedings in the federal courts within that State shall not be effective as *lis pendens* unless notice thereof be given in the form, manner and place required by that law of that State; provided, that the State by appropriate legislation authorize and direct its officers whose ministerial services are necessary to effect the notice required by the State law, to perform like services to effect the notice required by this Act; provided further, this Act shall not apply to suits, actions, or proceedings now pending.

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The emigration to the American colonies, comprising the original thirteen states of the United States, in the year 1624 was 9,000. The population of those colonies in early years was computed to be as follows: In 1649, 15,000; in 1689, 200,000; in 1715, 434,600; in 1733, 750,000; in 1776, 2,243,000. In 1790 the population of the United States was 3,929,214; in 1800, 5,308,483.

# TITLE AND ABSTRACT DEPARTMENT

Frank C. Hackman, Editor in Charge

## JUDGMENT LIEN ON AFTER-ACQUIRED TITLE PREVIOUSLY CONVEYED

Where a grantor conveys property which he does not at the time own, but title to which he subsequently acquires, his subsequently acquired titles enures to the benefit of the grantee. And this is so in some cases even if the conveyance is without covenants of warranty, as where there is a manifest intent to convey an estate of a particular description. In situations of this kind the question is sometimes presented as to whether a judgment rendered against the grantor prior to the time he acquires title attaches as a lien upon the premises notwithstanding the prior conveyance thereof, or does the title to the land enure to the benefit of the grantee free of the judgment lien. This problem has been considered in several cases.

An heir, previous to the death of his ancestor, conveyed by deed dated August 7, 1820, his interest in his ancestor's estate. A judgment of date of December 4, 1818, had been rendered against the heir. He inherited the property on the death, May 21, 1821, of his ancestor. Thereafter an execution sale under the judgment was made of the premises. It was held the purchaser at the execution sale, and not the grantee of the heir, acquired title. It was the view that the deed from the heir barred him and his heirs from asserting title to the inherited estate against his grantee and those claiming under him, but did not operate as an estoppel to bind strangers like the purchaser at the execution sale made under a judgment entered previous to the conveyance. The judgment *co instanti* the property descended became a lien thereon, and the title to it vested in the purchaser at the sheriff's sale. *Jackson v. Bradford*, 4 Wend. (N. Y.) 616, 10 N. Y. Com. Pleas 728.

In another case one J. W. Brown, expecting to inherit certain land from his mother, by deed dated March 10, 1904, conveyed the premises to Julia Reinhart. A judgment against Brown had been rendered November 9, 1896. His mother died April 15, 1904, and the property then descended to him. Enforcement of the judgment by execution sale of the land was thereafter sought. The question before the court was, Did Mrs. Reinhart take the land free from the judgment lien? The court said:

"Assuming the conveyance was made for value and in good faith on the part of both parties it could not affect the title to the land. The grantor did not hold the slightest present interest in it. The whole title legal and equitable belonged to his mother. The deed was a nullity so far as her title is concerned. When she died, her title necessarily went somewhere, as the title to real estate can never be without an owner. The owner at the time of her death had made no disposition thereof which became effective, and therefore its subsequent ownership could only be determined by operation of law. Mrs. Reinhart, as against the deceased owner, held no right to the land whatever. She was a stranger. Under the law of descents and distribution the land descended immediately to the son, Brown. It was his; nothing prevented him from successfully asserting ownership, except his transaction with Mrs. Reinhart. As against every other person, it belonged to him, but it would have been a fraud upon her to repudiate the conveyance, and the law of estoppel would prevent him from doing so. \* \* A court of equity would doubtless recognize and uphold the conveyance as between the immediate parties thereto, but would not, in so doing, interfere with the rights of other persons. In contemplation of law the conveyance to Mrs. Reinhart carried to her the same interest therein that she would have received if it had been executed after the death of Brown's mother, and no more. She took the land subject to the debts of her grantor. These propositions seem too clear to justify citation of authorities." *Bliss v. Brown*, 96 Pac. 945.

In the two foregoing cases the judgments were rendered prior to the execution of the conveyances. But the same decision was reached in a case where the judgment was entered subsequent to the conveyance. In this case, by deed dated August 2, 1904, a grantor conveyed an one-fourth interest in land which was the interest he believed he had, whereas he only owned an one-eighth interest. On the death of his mother, May 17, 1913, he acquired an one-eighth interest. A judgment of date of September 16, 1904, was of record against him. It was held the one-eighth interest became subject to the lien of the judgment as soon as he inherited it, notwithstanding it immediately vested in the grantee under the previous conveyance of the one-fourth interest. *Leslie v. Harrison Nat. Bank*, 154 Pac. 209.

A decision contrary to the foregoing was rendered by a federal court in Minnesota. In this case, a grantor, who had a bond for a deed, conveyed the land by warranty deed. He subsequently acquired title to the premises. After his deed but prior to the time he acquired title, a judgment was entered against him. It was held the grantor's

after-acquired title vested in his grantee eo instanti the grantor obtained it, and that there was no space of time in which the lien of the judgment could attach in the transition of the title through the grantor to the grantee. *Lamprey v. Pike*, 28 Fed. 30.

No privity exists between a judgment creditor and his debtor. They are not, by reason of the relationship, privies in blood, law or estate. They are not in law, because their relationship is one of antagonism rather than mutual confidence; nor by estate, because a creditor has no estate in the debtor's land. The relationship of a judgment creditor to his debtor's real estate is anomalous. He has a lien on it by statutory law, but no interest that makes him a privy in estate with the debtor. *Water's Appeal*, 35 Penn. St. 523.

In those jurisdictions where a grantor is merely estopped to set up his after-acquired title against his grantee, the estopped does not, of course, extend to judgment creditors of the grantor, they not being privies. But in jurisdictions where an estoppel is construed to effect an actual conveyance of the premises, or where such a result is effected by statute, it would seem that the title of the grantee becomes vested in him as by a conveyance executed by his grantor at the time the latter acquires his title. Hence, in these jurisdictions a judgment against the grantor rendered prior to the time he acquires title would seem, on principle, to become a lien on the premises; but that a judgment rendered subsequent to the time the grantor acquires title which he has previously conveyed, will not attach as a lien.

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### BUSINESS BRIEFS

In making continuations some abstracters refer to the "caption" of the abstract for a description of the premises to which the certificate of the continuation relates. The "caption" is usually the outer front cover of the original abstract, a blank sheet save for the description set forth on it, and, perhaps, the name and address of the makers of the original abstract. It is subject to much wear and tear, becomes worn and mutilated, with the result the description on it is often illegible. Why should not each certificate contain a description of the premises it relates to? At any rate a clean, new cover properly labeled ought to be provided by the abstracter last continuing the abstract. It gives him, at least, the chance to advertise himself by using a cover with his business name, address, etc. thereon.

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"Filing" consists in placing in the custody of the proper official the paper to be filed, and is completed when the paper is lodged with the proper officer, whose endorsement, though required of him as a

duty, is unnecessary to complete the filing or to give validity to the paper filed. New Jersey. *Mahuken v. Meltz*, 116 *Atl.* 794.

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An abstract certificate recently came to our attention, which, with substitution of fictitious names for those in the certificate, read as follows:

"To Whom It May Concern: The Doe County Abstract Company by Richard Roe, Manager, hereby Certifies that the foregoing 20 pages comprise a full, true and correct Abstract of all instruments on file or of record affecting the realty described in the Title Page of this Abstract, and that there are no Liens, Judgments, Tax Sales or Tax Deeds, other than noted, and that all realty taxes, not otherwise noted are paid.

"Dated at Doe, Doe County, ..... (State) on this 3 day of January, 1918, at 8 o'clock A.M.

"Respectfully Submitted, The Doe County Abstract Company, by Richard Roe, Manager."

This certificate presents a problem. An abstract that comprises "a full, true and correct abstract of all instruments on file or of record affecting" the premises must necessarily show all liens, judgments, tax sales and tax deeds. But it would appear that the abstracter did not include the latter among "all instruments" inasmuch as he specifically certifies them as separate and distinct items. One must infer, therefore, that the term "all instruments on file or of record" had a limited significance in the mind or intent of the abstracter. What then, one could properly ask, is the true scope, not measured by words but by intention, of the search that was actually made? Did the abstracter consider judicial proceedings within the meaning of "all instruments on file or of record"? Did he search as to them, or as to municipal records? The certificate does not enable one to determine.

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Every now and then some group or association of title men become seized of a hope or a conviction that some problem or business difficulty that confronts them can be solved by legislative enactment. Forthwith a bill is drafted and a committee appointed to attend to the matter of getting the legislature to make it a law. All goes well that far. But how many bills, particularly those not of general interest to the public at large, run the gauntlet of a legislature's consideration and come out, if approved at all, garbed in the same dress of words and terms that they wore when they started? Very few, we venture to say. A business that, of the volition of those engaged in it, seeks legislative benefits is apt to find itself looked upon by outsiders as one

requiring regulation. And the bill affords the latter ample opportunity and occasion to have their say.

It is not a simple matter, as a general rule, to secure the enactment of even a meritorious bill. Legislators are human. In this connection we recall an incident related by a veteran member of the legislature of a state in the Mississippi Valley. Discussing his experiences with lobbyists, he told how one year the dentists in his state had formed a state association and drawn up a bill providing for the appointment of a state board of dental examiners. This board was to draw very excellent salaries and allowances, examine and determine the fitness to practice dentistry of applicants, grant licenses to those deemed qualified, and on one was to be allowed to practice except licensed to do so by the board. "And," said the veteran legislator, "down to the legislature came a swarm of dentists to boost the bill. It was not drawn to require them to be examined, but only those who should want to practice after the bill became a law. Among them was one who had monkeyed with a tooth of mine, bored, scraped, filed and hammered it, kept me in misery for days, and soaked me a stiff bill for my pain. And he had the gall to button-hole me, and ask me to vote for the bill. Well, if any one needed to be examined as to fitness I thought he did, but he was not going to be. The way he and the rest of them pestered me made me sore, and I made up my mind I would fix their bill. It came up for consideration in due course, and then I got a brilliant idea very suddenly. The penal section of the bill made it unlawful for any one to extract teeth, etc., except he had been duly licensed as provided by the act. I offered an amendment to that section which read, "Provided, this shall not apply to farmers extracting the teeth of harrows on their own premises. And that bill was laughed over on to the table for that session."

Up in one of the Dakotas where the abstract business is subject to full statutory regulation, including even the amount of fees that may be charged, a veteran abstracter remarked in response to a query as to what he thought of regulation: "Oh, regulation is a fine thing—if it's the other fellow who's regulated."

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#### LAWYERS MAY NOT PRACTICE IN ADEN

The unique feature of the legal system of Aden, Arabia, is the absolute prohibition of all lawyers to reside or practice in the city. This regulation is very strictly enforced, even to the point of deportation if necessary. This provision is a relic of the early days of Aden, when it was a small military post. The population is now 55,000, and Aden is the business center of the entire Red Sea district, but the requirement is still rigid. The principal reason is that, for the most part, the magistrates and judges are not trained



to the law. It is felt that the introduction of lawyers would result in the outwitting of the judges and in the miscarriage of justice to a much greater extent than their work would be of assistance in determining the law in the case. As it is, the general opinion is that substantial justice is done, although the reasoning may not in all cases be technically correct.

### RECENT DECISIONS

The New Jersey case of *De Wyckoff v. Fidelity Union Trust Co.*, 116 Atl. 714, concerns a loss under a policy of title insurance. The decision in part is as follows:

"This action is based upon a policy of insurance issued by the defendant to the plaintiff guaranteeing him against loss arising, among other things, from a defect in title of lands to be purchased by the plaintiff. After purchase by plaintiff it was discovered that the title to a portion of the land, amounting to 2.70 acres was defective. The liability of the defendant is not questioned, and the only matter at issue is the measure of damages. After the defect in title was discovered, the defendant and plaintiff made an oral agreement about the matter which, at the request of the plaintiff, the defendant reduced to writing as follows:

"Confirming the conversation which you had with Mr. Hood in the presence of your client Mr. De Wyckoff and myself in relation to the loss sustained by Mr. De Wyckoff on the guaranty issued by this company (then follows a description of the property), the Fidelity Trust Company hereby admits that a portion of the property covered by this guaranty, being approximately five hundred and ten feet on the Franklin turnpike and ranging in depth from one hundred and forty-three to four hundred and thirty-six feet alleged to be owned by one Appert, is covered by the guaranty, and that Mr. De Wyckoff has sustained damage and is entitled to recover under our policy from Fidelity Trust Company the value of that piece of land. Fidelity Trust Company hereby waives any formal requirement as to notice, suit or judgment which may be required under the terms of its policy; the only matter in controversy between the said Mr. De Wyckoff and Fidelity Trust Company being the amount of the damage sustained by him, which is to be arrived at by mutual agreement if possible. Mr. De Wyckoff, if he so elects, is to acquire the title to said property either directly, or through Fidelity Trust Company, advancing the purchase price of \$5,000, and Fidelity Trust Company is to make good to Mr. De Wyckoff the amount of his damage under said guaranty, but in no event in excess of the said purchase price.'

"The plaintiff purchased the property for \$5,000, and the jury awarded that sum with interest. The court left to the jury the ques-

tion whether this letter was a request by the defendant to the plaintiff to purchase the property at a price not exceeding \$5,000. Section 9 of the policy of guaranty provides that, if there shall appear to be an outstanding estate in all or any part of the premises guaranteed which may be acquired by the party guaranteed, the latter shall on the request of the company acquire such estate, provided it shall not cost more than the amount of the guaranty. It can hardly be reasonably disputed that, when it appears, as in this case, there is an outstanding estate, and the guaranteed party, claiming a fulfillment of his guaranty, is told by his guarantor that he may, if he elects, acquire the outstanding estate, the cost and damages of which the company will pay him if it does not exceed \$5,000, it is a request to acquire the property for which it will pay him the agreed sum in settlement of the damages for which liability is admitted.

\* \* \* The tract of land contained about 190 acres, and the defendant claims that the plaintiff was only entitled to recover, under this policy, such portion of the total insurance of \$100,000 as the value of 2.70 acres bore to the whole. The question thus raised we are not required to determine in this case, because the supplemental agreement determined the liability of the defendant as well as the extent of it."

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#### A QUESTION IN TITLE INSURANCE

An interested subscriber asks if it is necessary that he have a record interest in a specific parcel of land in order to secure a purchaser's policy of title insurance as to that parcel. Some companies do not require one who is to be insured as a purchaser to have a record interest. They will insure the title of the record owner, as the seller, to any one, subject to any existing defects or encumbrances, the claims of those in possession or claiming to be in possession, and rights claimed under instruments, including material or labor liens, that are not of record. These exceptions would be made in the case of owner's insurance, or in the case of a record purchaser's insurance. Say, for example, the records show A is the fee owner of a lot, subject to a mortgage from A to B, and an application is made to insure X as a purchaser, who has no record interest of any description. A policy can be issued insuring X that A has a fee simple estate, and against loss by reason of any defects in, liens or encumbrances upon A's title, except those noted in the policy, including the mortgage to B and the general exceptions above noted. The policy may have been applied for by reason of a contemplated sale by A to X of the premises. That sale may not be consummated. But unless X actually acquires some interest in the property and suffers a loss with respect thereto, by reason of some defect, lien or encumbrance in existence prior to the date of the policy and not excepted therefrom, he cannot lose anything—suffer damage—and therefore can have no recovery on the policy, though it be erroneous.

Assume, as another state of fact, that subsequent to the date of such policy X enters into a contract to purchase the land, or buys and gets a deed, the policy will not protect him against damage by reason of matters of record,—liens, encumbrances, conveyances, suits, etc.,—filed, recorded or both, in the intervening time between the date of the policy and the time he obtained his contract or his deed, as the case may be.

To obtain the full protection of a purchaser's policy of title insurance a purchaser should have the owner's title insured in himself of the date he completes his transaction with that owner, or of a subsequent date.

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### REGULATIONS RESPECTING STAMP TAXES

The rules in regard to stamp taxes below noted have been promulgated by the Treasury Department in Regulation 55. Such as are here set forth are those directly concerning instruments used in real estate transactions, and, therefore, of practical value to readers of THE LAWYER AND BANKER. The references are to the respective articles of the above mentioned regulations.

The person who makes, signs, or issues any taxable instrument must affix and cancel the stamps. The grantee in a deed is liable for the tax as well as the grantor. Art. 66.

Where the consideration for a conveyance of lands, tenements, or other real property, is left open to be fixed by future contingencies, the actual value at the time of the conveyance is the measure of the tax. Art. 67.

The tax is computed upon the full consideration for the transfer less all encumbrances on the property before the sale and which are not removed by the sale. Encumbrances placed on the property in connection with and as a result of the sale or transfer, as well as notes for deferred payments, can not be deducted in determining the amount upon which the tax is calculated. Art. 68.

The tax on a deed of real property executed by a sheriff, referee or commissioner, to mortgagee, who bids in the property at foreclosure sale to satisfy a mortgage lien, should be computed on the amount bid for the property plus the costs, if paid by the purchaser. Art. 69.

Deeds in escrow become subject to stamp tax upon delivery to the grantee. Art. 73.

Deeds executed by masters in chancery, sheriffs, clerks in courts, etc., to cover transfers of property sold under a foreclosure or execution are subject to tax. The grantee or vendee may be required to pay the tax or the cost of revenue stamps may be included in the expenses of foreclosure sale. Art. 74.

Upon exchange of two properties, the deeds transferring title to each are subject to tax, which should be computed in each case on the

basis of the actual value of the interest or property conveyed, the amount of any pre-existing lien or encumbrance which is not removed by the sale being deducted. Art. 75.

What constitutes "lands, tenements, or other realty," is determinable by the law of the state in which the property is situated. Standing timber is ordinarily held to be real estate, and where so held the deed transferring it is subject to the tax. Art. 76 a.

In states where common-law dower still exists an instrument purporting to convey the inchoate right of dower of a wife or the consummate right of dower of a widow, prior to assignment of dower, is not subject to stamp tax; but an instrument conveying the estate acquired by a widow upon assignment of dower is subject to tax. Where by statute dower has been abolished and a different interest in the husband's real property conferred upon the wife in lieu thereof, the taxability of an instrument purporting to convey such an interest prior to its assignment will be determined by the nature of the wife's interest, and the statutes and decisions of the particular state in which the real estate is located must be consulted. Art. 76 b.

Deeds conveying mines are taxable. Art. 77.

A conveyance of property subject to an equity of redemption is taxable when made, not when the time for the equity of redemption has expired. Art. 78.

A conveyance of land in consideration of life maintenance is taxable, the tax measured by the value of the property or interest conveyed. Art. 79.

Stock in a corporation is a valuable consideration for the transfer of real property. Art. 81.

A quit-claim deed for no consideration, or for the nominal consideration of \$1, for the purpose of correcting a flaw in title is not subject to tax. Art. 82.

Options to purchase, contracts for the sale of real estate, deeds of release and deeds of trust are not subject to the stamp tax. Arts. 83, 84.

Deeds executed by state, county, or municipal officers conveying realty sold for non-payment of taxes are not subject to stamp tax. Art. 85.

Deeds conveying to a state real estate purchased by it are not subject to tax. Art. 86.

Deeds to burial sites which do not convey title to land, but only a right to sepulture, to erect monuments, etc., are not subject to stamp tax. Art. 87.

A deed issued to cover a pure and bona fide gift of property from

husband to wife, or from parent to child, or from an individual to a municipality or other political sub-division, or to the United States, wherein the consideration named is "natural love and affection and \$1," "desire to promote public welfare and \$1," or "\$1 and other valuable considerations" is not taxable. Art. 88.

A deed by a debtor assigning property to a trustee for benefit of creditors is not subject to tax. But when the trustee sells or conveys such property either to a creditor or other persons, the deed by him is taxable. Art. 89.

A deed transferring title to property to a building and loan association for the purpose of securing a loan thereon, which property is immediately reconveyed to its owner, is not subject to tax, nor is the deed of reconveyance. Art. 90.

A deed by a husband and wife to a "straw man" who immediately reconveys the property to the wife is not subject to tax if given for no valuable consideration, or merely the nominal consideration of \$1, and the deed of reconveyance is likewise exempt. Art. 91.

Deeds from an agent to his principal of lands purchased for and with funds of the principal are not taxable. Art. 92.

Conveyances of property of a copartnership, in the hands of receivers, back to the owners after administration of the estate, are not taxable. Art. 93.

Partition deeds are not subject to tax unless a consideration passes between the parties by reason of one or more of them taking under the division a share of real estate of greater value than his undivided interest, in which event stamp tax attaches to the deeds conveying such greater shares, calculated upon the consideration. Art. 94.

Conveyances of realty not in connection with a sale, to trustees or other persons without consideration are not taxable. Art. 95.

Deeds conveying real estate in a foreign country; deeds that are simply confirmatory and do not vest title not already vested; contracts for the sale of real property that do not vest title, and leases of property, are not subject to stamp tax. Arts. 96, 97, 98, 100.

A conveyance of real estate by co-owners to a corporation organized for convenience in handling the property, made in consideration of the issue to them of the corporation's capital stock, is subject to tax. Art. 101.

Deeds by an executor to devisees conveying specific parcels of real estate, devised to them in common, are not subject to tax unless a consideration passess between the devisees by reason of some of them taking a greater share in the real estate than that to which entitled under the will, in which event tax attaches to the deeds conveying such

greater shares, calculated upon the amount of value of such consideration. Art. 102.

A conveyance of real estate by a corporation without valuable consideration to an owner of all its capital stock in consequence of its dissolution is not subject to tax. Art. 103.

A conveyance by defaulting mortgagor to mortgagee in consideration of the cancellation of mortgage debt is subject to tax calculated on the amount of the mortgage debt plus unpaid accrued interest. Art. 104.

Conveyances to a trustee or from a trustee to a cestui que trust without valuable consideration, are not subject to tax. Art. 105.

A conveyance of real estate sold to the United States Government is subject to tax. Art. 106.

A deed from a corporation, the entire capital stock of which is owned by another corporation, conveying real estate to the latter in consideration of the payment by the grantee of all obligations of the grantor is subject to tax. Art. 107.

Judgments and decrees of state courts operating to transfer title to real estate are not taxable as conveyances. Art. 108.

Taxes and assessments which have become a lien on real estate by operation of statute and which are not paid at time of sale are deductible from the consideration in computing the stamp tax. Art. 109.

Where an officer of a corporation purchases real estate from the corporation, conveyance being first made to a third party, and as part of the same transaction the property is conveyed by the third party to the officer, the conveyance to the third party is subject to tax, while the conveyance from the third party is not subject to tax. Art. 110.

The law does not prohibit parties in interest from entering into an agreement as to which of them shall pay stamp taxes. Art. 171.

The tax on a power of attorney is due when executed and delivered. Delivery includes depositing it in the mails. Art. 129.

The tax on a power of attorney is imposed on the instrument itself and is not measured by number of persons joining in it. Art. 130.

A power of sale embodied in a mortgage authorizing and empowering a mortgagee himself, upon default, to make public sale of the property affected and to convey the title to the purchaser at such sale free of rights and equity of redemption, thus avoiding foreclosure, is not taxable. Art. 133.

An assignment for a valuable consideration of mortgages, etc., ordinarily transfers to the assignee all the rights of the assignor and the remedies necessary for their enforcement, and the assignee ac-

quires no further rights by means of a power of attorney clause in the assignment than are conveyed by the instrument itself, and such pro forma power of attorney is therefore not taxable. Art. 137.

A warrant of attorney embodied in a lease is not taxable. Art. 141.

A power of attorney authorizing a deputy to have access only to a safe or safety deposit box is not subject to tax, but a power of attorney to have access and control over its contents is subject to tax. Art. 146.

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### STATE STATUTES AFFECTING ABSTRACTERS AND INSURERS

North Dakota.—In this state it is unlawful to engage in the abstract business "without first having for use in such business a complete set of abstract books or records of all instruments filed or of record in the office of the register of deeds in and for the county in which such business is to be conducted, or in good faith engaged in the preparation for not less than three months of such books or records, and without first filing in the office of the county auditor (or treasurer) of the county in which such business is to be conducted, a surety or personal bond to the county in the penal sum of ten thousand dollars for each and every ten thousand inhabitants or major part of that number residing within such county as shown by the official federal or state census last taken prior to the filing of such bond, provided, that in counties containing less than a major part of ten thousand inhabitants the bond shall not be less than five thousand dollars. The bond to be approved as to form and security by the board of county commissioners of the county, and conditioned for the payment of damages suffered by any person on account of errors in any abstract or certificate of title. If a personal bond is given there must be at least three sureties, none of whom shall be officers or stockholders of the abstract company, and each of whom must justify for the full amount of the bond. The bond having been approved and filed the county auditor must issue to the abstractor a certificate reciting the bond has been approved and filed, and authorizing the abstractor to do business. The bond runs while the abstractor is in business, but not to exceed five years. The county commissioners may require, at any time, on ten days' notice, the abstractor to furnish additional bond, or show cause why his bond should not be cancelled, and if within such time such additional bond be not furnished, or reason shown why it should not be required, then the abstractor's certificate may be recalled and annulled. *Comp. L. N. D.*, 1913, *secs. 3090 to 3093.*

And it is further provided that: "For making and certifying to abstracts the following fees and no more shall be allowed: For the first entry on any one abstract, one dollar; for each subsequent entry or transfer on such abstract, twenty-five cents; for entry relating to taxes, twenty-five cents; for entry relating to mechanics' liens, twenty-five cents; for entry as to judgments which may constitute liens on the property, fifteen cents for each name certified to; for certificate to abstract, twenty-five cents. It shall be the duty of such abstracters to continue any abstract so made by them, on payment of twenty-five cents for each entry made thereon, and twenty-five cents for the certificate of continuation thereto. Each and every deed, mortgage, affidavit, lease, lis pendens, judgment, mechanic's lien or other instrument on file or of record in the offices of the registers of deeds or clerks of courts affecting the title to real estate so abstracted shall constitute an entry; for the abstracting of estates in county courts which are not recorded in the office of the register of deeds, such fees may be charged by such abstracters as may be reasonable, but in no case to exceed five dollars for each estate." *Comp. L. N. D.*, 1913, sec. 3097.

Abstracters must have a seal with the name and location of such person, firm or corporation stamped thereon, and deposit with the county auditor an impression thereof before a certificate of authority issues, and must affix an impression on every abstract or certificate issued. *Comp. L. N. D.*, 1913, sec. 3098.

And in North Dakota any number of persons not less than nine, not less than three of whom must be residents of the state, may associate themselves together to form a corporation to do an annuity, safe deposit, surety or trust company business. Such company must have a capital stock of not less than \$100,000. It must invest \$50,000 in specified securities, and deposit the same with the state treasurer as security for depositors, creditors and others, and shall have power, among others, to make, compile and certify abstracts, and "to insure the validity and genuineness of titles to real property." *Comp. L. N. D.*, 1913, secs. 5205, 5210; 7.

In connection with the statutory fee schedule for abstracters above mentioned it is interesting to compare the fees authorized to be charged by public officials. Clerks of the district courts, for certifying an abstract of real property as to judgments and liens, for each person named in the abstract as to whom search is made, are authorized to charge ten cents; county treasurers for each abstract certified to as to unpaid taxes, twenty-five cents; registers of deeds, for making certified abstracts of title, for first deed or transfer, one dollar,



and for each additional deed or transfer, twenty-five cents, and for making abstract of chattel mortgages one dollar for first entry, and for each additional entry ten cents. It is also provided that, whenever any person presents an abstract to the register of deeds who made the same for continuation of such abstract, it shall be his duty to continue the same and he shall be entitled to receive twenty-five cents for each new transfer and no more. For a certificate and seal, twenty-five cents. *Comp. Laws N. D.*, 1913, *secs.* 3498-21, 3345, 3511 *subd.* 3, 4, 5, 12.

Minnesota.—There is a peculiar law in force in this state as follows: "The county board may by resolution authorize any person to use a portion of the county building for the purpose of making abstracts of title, upon execution by such person of a bond to the county in a sum not less than \$500, conditioned for the faithful performance of his duty as such abstracter and that he will handle all public records with care, and charge no greater fee for abstracts of title than is or may be allowed by law to registers of deeds for like services." *Minn. Genl. Stat.*, 1913, *sec.* 896.

Kentucky.—Any number of persons not less than thirteen, may associate to establish a corporation for the purpose of conducting, and it may conduct, both a general banking business, a trust company business and a real estate title insurance business. The capital stock of such corporation shall not be less than \$150,000, of which at least two-thirds shall be subscribed and paid in money before said corporation shall commence business, and the remainder shall be subscribed and paid in within eighteen months thereafter. Not less than \$50,000, and never more than one-third or less than one-tenth of the total capital stock of any company shall be used in its business of real estate title insurance; and one-half of such authorized capital stock, remaining after deducting so much thereof as may be set apart to the department of real estate title insurance, shall be securely invested for the trust business of the corporation, and shall, at all times, be kept separate and distinct from its other assets, and shall be primarily liable for its fiduciary obligations; and the other half of such remainder of the capital stock of the corporation may be used in its business of banking; and its books shall be so kept as to show separately at all times the condition of its trust business, the condition of its banking business and the condition of its real estate title insurance business. *Carroll's Ken. Stat.*, *sec.* 883 c-1.

Oregon.—When the Oregon code governing trust companies was adopted, it was therein provided that "Every trust company which at the time this act takes effect lawfully possesses the power, for hire, to

examine titles to real estate, to procure and furnish information in relation thereto, and to guarantee or insure the title to real estate to persons interested in such real estate or in mortgages thereon against loss, by reason of defective title or other encumbrances of or upon such real estate, shall continue to possess such power." (*Oregon L.*, 1920, *sec.* 6233, *subd.* 16.) By this section of the code the power exercised by existing trust companies to insure titles was saved to them, but such power was not conferred upon trust companies subsequently organized.

The conduct of a title insurance business is regulated by the insurance code. That code requires a company organized for the purpose of "certifying to the ownership of titles to real property or of guaranty such titles, or of insuring the owners of real property against loss by reason of defective titles thereto, or encumbrances thereon," before engaging in such business shall have a paid up capital stock in amounts as follows:

In counties having a population of two hundred thousand or more as evidenced by the last official census of the United States or of the state of Oregon, the capital stock shall be not less than \$100,000, of which it shall deposit with the state treasurer the sum of \$50,000. In counties having a population of not less than one hundred thousand nor more than two hundred thousand as evidenced by the last federal or state census, the capital stock must not be less than \$60,000, of which \$30,000 must be deposited with the state treasurer. In counties having a population of not less than fifty thousand nor more than one hundred thousand, the capital stock shall be not less than \$40,000, of which \$20,000 shall be deposited with the state treasurer. In counties having a population of fifty thousand or less the capital stock must be not less than \$20,000, of which \$10,000 must be deposited with the state treasurer. The sums required to be deposited may be invested in bonds of the United States, or of any state, or of any municipality of more than fifty thousand population, the market value of which is at or above par, or in notes secured by mortgages on real estate worth twice the amount thereof. Or the company may make an investment in real estate in the state (Oregon) of not less than \$50,000 in value, title to be vested in the state treasurer, and the company must pay all taxes thereon. *Oregon Laws, Olson*, 1920, *secs.* 6337, 6553.

In respect of making the amount of deposit required depend on the population of the country the Oregon law follows the same principle as the Washington law. The Washington law, however, has a more elaborate scale of deposits, and differs from the Oregon law in having no requirements as to capital, but other provisions not in the law of

Oregon. The following statement shows some contrasts between the statutes of the two states: Population, 200,000; Oregon, capital \$100,000; deposit \$50,000; Washington, deposit \$75,000. Population, 50,000: Oregon, capital \$20,000, deposit \$10,000; Washington, deposit \$25,000. Though as stated, the Washington law has no requirements as to capital, a larger capital is necessary there than in Oregon owing to the larger deposits required, and to the further fact that the Washington law makes possession of tract indexes a pre-requisite to the conduct of a title insurance business. (The law of Washington was published in March-April issue of the *THE LAWYER AND BANKER*, pages 108 to 112.)

Colorado.—Any number of persons not less than three may form a corporation to insure "owners of real estate, mortgagees and others interested in real estate, from loss by reason of defective titles, liens and encumbrances, and of the insurance of loans of every and all kinds, and in such manner and upon such terms as may be agreed upon between them." A company must have not less than \$100,000 capital stock paid in cash. The officers and stockholders of such company "shall be individually liable for all debts or obligations contracted during the time of their being officers or stockholders, \* \* equally ratable in amount equal to their respective shares of stock \* \*." *Mill's Stat.*, 1912, secs. 1081, 1082.

#### U. S. SUPREME COURT REPORTS

Last July, Congress passed an act (Public No. 272) providing for the publication of the Official Reports of the Supreme Court in the Government Printing Office and for their sale to the public at cost of production, including a part of the appropriation made for the maintenance of the Reporter's office. This did away with the method of publication through contracts between the Reporter and private publishing houses, which had obtained from the beginning. The last contract of that kind expired with the publication of Volume 256, which completed the reports for the October 1920 Term. The letting of a new contract to cover the opinions of the 1921 Term was impracticable, owing to the pendency of the legislation, to the expectation that it would be enacted long before it actually was, and to definite indications that, when enacted, it would supersede the contract method.

For various reasons, incident to the ending of the old contract and the legislative change, editorial work on the opinions of the 1921 Term was seriously delayed. Time also was consumed by administrative preliminaries under the new law, and in making necessary preparations in the printing office. Notwithstanding this, however, gratifying progress has been

made. The reports of these opinions will be contained in three volumes to be numbered 257, 258 and 259, all of which, it is confidently expected, will be published in bound and pamphlet form before the close of the year.

Especial attention is directed to the fact that it will not be necessary to send in a separate order for each pamphlet or volume purchased. Standing orders with advance deposits will be received by the Superintendent of Documents, Government Printing Office, Washington, D. C., and the publications will be mailed, as issued, to the addresses given, as long as the amounts kept on deposit suffice to pay for them.

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According to Dun's Review returns from 104 cities in the United States showed a large advance in estimated building expenditure during last June over that of June, 1921,—\$224,118,649 in June, 1922, and \$136,007,024 in June, 1921. The seven leading cities in amount in order of rank were New York, Chicago, Minneapolis, Philadelphia, Los Angeles, Detroit, Cleveland, Washington. The expenditures in June of this year (first amount) and in June of last year (second amount) in the cities named afford an idea of specific increases: Chicago, \$26,576,850; \$7,484,200. Philadelphia, \$13,190,220; \$4,587,395. New York, \$45,018,635; \$37,173,332. Los Angeles, \$10,652,265; \$6,269,546. Seattle, \$2,892,030; \$919,740. Des Moines, \$1,556,200; \$242,975. Wilkes-Barre, \$581,324; \$94,975; San Francisco, \$3,336,701; \$950,965. Tulsa, \$1,050,251; \$286,125. Prosperity is coming to abstractors.

# BOOK REVIEWS

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## DOCUMENTS AND THEIR SCIENTIFIC EXAMINATION

Messrs. Charles Griffin & Company, Limited, Exeter Street, Strand, London, England, have published and are offering for sale a very interesting work, "Documents and Their Scientific Examination" by C. Ainsworth Mitchell, M. C., F. I. C.

This work is also handled in Philadelphia by J. P. Lippincott Company.

This work has been prepared with special reference to the chemistry involved in cases of suspected forgery, investigation of disputed documents and handwriting. This is a branch of "Forensic Chemistry" that has long been strangely neglected and so far as we know there has been no work dealing fully with the subject until this time, from all points of view.

The studies embraced in this little work of two hundred and fifteen pages, include the result of the investigations of the writer on the composition and behaviour of inks, pencil pigments, and other writing materials, as well as the questions of the materials upon which writing, typewriting or printing appear, of handwriting, of finger prints, photography and microscopical examination. When considered in connection with the presentation of expert evidence in legal cases, and investigation of anonymous letters are of material importance.

Taken in connection with Albert S. Osborn's "Questioned Documents" of 1910, or his more recent work on "Problems of 'Proof'" 1922, this work by Mr. Mitchell becomes of particular value.

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## THE LAW OF LAND CONTRACTS

By Asher L. Cornelius, (Callaghan and Company—1922) is, we believe, the first published treatise upon this modern subject. Its author is an honored member of the Detroit, Michigan bar and his book is indicative of a wide knowledge and legal insight acquired through many years of practice before the courts of that state. In his preface Mr. Cornelius frankly invites suggestions for any improvements upon his work, evidently having in mind a later edition. If such a venture is made we would respectfully suggest that Mr. Cornelius give his subject a little broader scope and refrain from the copious quotations in which he indulges in the present volume. It is unfortunate for the profession at large that the author of this really excellent work has confined himself almost exclusively to Michigan authorities. To make the treatise more general would not only make it more valuable to the profession in states other than Michigan, but relieve the author of the present apparent necessity for redundancy and verbosity.

We have left to the last the more pleasant things we would choose to say. Mr. Cornelius displays ripe scholarship and we have no doubt that the compilation of this book is the result of many years of the most careful research. His treatment of the subjects of Preliminary Agreements, Specific Performance, the Statute of Frauds, and especially of the vexed question of Forfeiture of Land Contracts and the Foreclosure of Vendor's Lien is bound to be most helpful to the members of the Michigan Bar. His thesis are well supported by citations and where the question is in doubt Mr. Cornelius is frank to say so, presenting clearly both sides of the issue. We can strongly recommend this treatise as a help and guide to the profession in the author's own state and as a matter of interest for those elsewhere.

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## OUR CHANGING CONSTITUTION

Charles W. Pierson has written a work using the above caption which has been published by Doubleday, Page & Company of Garden City, New York.

To the laymen this little book is both interesting and readable,

especially so to one who takes any interest in the privileges and duties of American citizenship.

The theme followed out has particularly to do with Federal encroachment upon State powers. Vividly is portrayed the profound change which is taking place in our political system, as well as in the decisions of our courts of last resort.

It has always been a mooted question just where the line lays between the police power of the State and Federal legislation. This book goes far to clear up the questions involved and raised in the Eighteenth and Nineteenth Amendments. The discussion is particularly interesting as affecting the subject of Congress vs. The Supreme Court, in re Child Labor Laws, the Income Tax amendment, the Federal Corporation Tax and kindred subjects.

The chapter on State rights and the Supreme Court is historical, filled with citations of interest bearing upon the views of the writer. The question of whether Congress can tax the income from State and Municipal bonds is discussed as to the constitutionality of such legislation.

The work is one which should be in the hands of every reading intelligent American citizen. Economists and politicians will be interested in it as well.

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#### FREIGHT RATES AND CHARGES

The Traffic Law Service Corporation of Chicago have published an authoritative work on Freight Rates and Charges. It is the only work furnishing the laws governing the adjustment of rates and gives fully the basis for the settlement of claims involving rate damages. An examination of this work will readily indicate its value as a quick, trustworthy reference.

"Freight Rates and Charges" is the only up-to-date, comprehensive and authoritative work now on the market giving the laws governing this all-important subject. It is one of the most valuable of the series of legal publications being produced by the publishing company on Interstate Commerce Commission matters. It embodies a full report of the recent decisions of the United States Supreme Court in the intrastate rate case. The limited edition of this book is being rapidly disposed of. Bound in sheep, law size. Price \$7.50 delivered.

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